A
TREATISE
ON THE
LAW
OF
PRINCIPAL AND AGENT
CHIEFLY WITH REFERENCE
TO
MERCANTILE TRANSACTIONS.

BY WILLIAM PALEY,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

The Third Edition, with considerable Additions,

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PREFACE

TO

THE THIRD EDITION.

THIS Treatise has long been stamped with the approbation of the Profession; and it is therefore as unnecessary to say anything of its merits, as it would be invidious to criticise its defects. In the Second Edition much extraneous and irrelevant matter found its way into the text, which it has been the care of the present editor to remove. Indeed, for reasons which will be sufficiently obvious to those who are acquainted with the work, a small part only of the labours of the former editor has been suffered to remain. In what is left it has been found necessary to make occasional alterations of expression and transpositions of matter; so that the present edition may almost be considered as an immediate continuation of the original Treatise. It may be expected, therefore, after so long an interval, and it will be found that there is much new matter, in the introduction of which the method proposed has been this:— Where it formed a part of, or was directly con-

nected with the subject matter of the essay, it has been engrafted into the text; and in this process it has been endeavoured so to dovetail the new parts into the old, as not to offend the reader by abruptness of transition—a difficult task, and one in which the editor cannot flatter himself that he has been always successful. Where the new matter was not directly within the scope of the treatise, but analogous only and illustrative, it has been thrown into the shape of notes; as have also particular instances either of the application or of the qualification of admitted principles. Of such instances some have been purposely omitted, as elucidating nothing new, and a few may have escaped the editor's research. But as the clear development of a principle is of far greater importance than the accumulation of particular cases, such omissions will not, it is imagined, detract from the usefulness of the Work.

The additions of the present editor are distinguished at the commencement and termination by a ǂ.

King's Bench Walk,
5th Nov. 1832.

ADVERTISEMENT

TO THE

SECOND EDITION.

THE scarcity of the First Edition of this Work, coupled with the high estimation in which it is held by the Profession in general, induced the present Editor to undertake the task of preparing a new Edition. The additional matter, consisting chiefly of those decisions upon the Law of Principal and Agent which have taken place since the publication of the First Edition, is either placed between *crotchets*, or referred to by *figures;* and those decisions the Editor has endeavoured so to classify and arrange, that they should be incorporated under the several titles to which they respectively and peculiarly belong. The Editor, however, has to apologize for having given the case of "*Baring* v. *Corrie*" in the form of an Appendix: but this he was obliged to do from the circumstance of that case not having appeared in print until long after the greater part of the present Work was sent to the press.

Brick Court, Temple,
February, 1819.

PREFACE.

THE Law of Principal and Agent appears at first view to be founded upon principles so few and simple, and in general so easy of application, that a treatise upon such a subject may seem altogether superfluous. And indeed the decisions upon this branch of the law, which are to be met with in the older Reports, are neither numerous nor important. But the vast extension of modern commerce, both foreign and domestic, the novelty and variety of the channels through which it is carried on, and perhaps also a different system of transacting mercantile business, have given rise to new situations and questions upon the subject of commercial Agency, which have come under legal investigation. To collect and exhibit under one view the decisions which have taken place upon these questions, may perhaps be found of some use; and the rather, as they are most frequently such as arise in the course of trials at Nisi Prius, where a reference cannot conveniently be made to scattered authorities: a consideration which may furnish an apology for presenting the following Treatise to the Public.

It will be seen that it is not within the plan of the present Work to comprise every branch of the extensive relation which subsists between all employers and their representatives. The consequences of that relation, as they chiefly concern mercantile affairs, are the professed objects which the Author has had in view; though, for the sake of illustration or uniformity, he has occasionally introduced matters which do not properly fall under that description.

The Law of Master and Servant indeed, though a distinct subject from the present, and one which it was far from the Author's intention to treat of at large, is yet so intimately connected with that of Principal and Agent, of which it is the foundation, that perhaps a greater portion of it may be found in the following pages, than seems to belong strictly to a Work of this nature. It is hoped, however, that wherever this branch of the law is referred to, the reference will be found conducive to the solution of questions arising out of the proper subject of the Work.

Essex Court, Temple,
Jan. 4, 1811.

TO

THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE OF ENGLAND,

&c. &c.

THIS WORK IS INSCRIBED

AS AN IMPERFECT TESTIMONY

OF

RESPECT FOR HIS

GREAT PUBLIC VIRTUES,

AND

OF SINCERE GRATITUDE

FOR HIS UNMERITED KINDNESS TO

THE AUTHOR.

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A TREATISE ON THE LAW OF PRINCIPAL AND AGENT.

CHAPTER I.

OF THE RELATION OF PRINCIPAL AND AGENT.

PART I.—SECT. 1.

THE relation of Principal and Agent takes place wherever one person authorises another to do acts, or make engagements in his name.

In all cases where a man has power as owner, or in his own right, to do any thing, he may do it by another; as to sell his lands, goods, &c. but a bare authority can only be executed by the person to whom it is given.(a)

(a) 1 Salk. 96; 9 Co. 76; 2 Roll. Rep. 393; *Edmiston* v. *Wright*, 1 Campb. 88. So an attorney for making livery cannot make another attorney. 2 Roll. Ab. 9. "So if there be tenant for life, remainder, &c. with power to make leases for twenty-one years, he cannot make a lease by letter of attorney, by force of his power, because he has but a particular power

Persons who are disqualified from acting in their own capacity, as infants and femes coverts, may yet act as agents for others.(*b*)

The authority of an agent is created either by deed, by simple writing, by parol, or by mere employment, according to the capacity of the parties, or the nature of the act to be done.(*c*) It is said to be *general* or *special* with reference to its object, i.e. according as it is confined to a single act, or is extended to all acts connected with a particular employment.(1) With reference to the manner of its execution, it is either *limited* or *unlimited*, i.e. the agent is either bound by precise instructions, or left to pursue his own discretion.(2)

It is proposed to consider the effect of the relation of Principal and Agent, first, with respect to these parties themselves, namely, their mutual

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which is personal to him." *Lady Graham's case*, 21 Eliz. 9 Co. 76. And things annexed to the person, as homage and fealty, cannot be performed by attorney. Ib. "So it is said, 33 E. III. *Trespass*, 253, the lord may beat his villein with cause or without cause, but if the lord commands another to beat his villein without cause, he shall have an action of battery against him who beats him in such case." Ib.

(*b*) Co. Lit. 52 a; *Emerson* v. *Blonden*, 1 Esp. Cas. 142; *Palkthorp* v. *Furnish*, 2 Esp. Cas. 511.

(*c*) Post.

(1) ‡ See 1 V. & B. 209 ‡

(2) ‡ See the distinction between a *general* and an *unlimited* authority pointed out by Lord Ellenborough in *Whitehead* v. *Tuckett*, 15 East, 408.‡

obligations and rights; secondly, with respect to other persons who may be affected by it.

Sect. 2.

The Duties of Agents.

The particular duties and responsibilities of agents vary according to the nature, end, and terms of their employment; but some are incident to their general character, which will therefore be noticed in the first place.

The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions; for if he unnecessarily exceed his commission, or risk his principal's effects, without authority, he renders himself responsible [to the principal] for the consequence of his act. If loss ensue, it furnishes no defence to him, that he intended the benefit of his principal.(*a*) And on the other hand, if he

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(*a*) Beawes, Lex Merc. 41, 43; Malyne, 154. ‡ *Catlin* v. *Bell*, 4 Campb. 184. In this last case, goods, which the master of a vessel had undertaken to sell *in the West Indies*, had been delivered to him for that specific purpose; and he, being unable to procure a market for them there, had sent them by another person in search of a market to the *Carraccas*, where they were destroyed by an earthquake. Lord Ellenborough held, that a special confidence having been reposed in the master as to the sale of the goods, he had no right to hand them over to another person and to give them a new destination; and the plaintiff (the owner of the goods) recovered against him in an action for not accounting to her. ‡

thereby obtain an advantage, or make a profit, he will not be allowed to retain it; but must account to his principal for the whole, notwithstanding that he bore the risk of failure.(*b*)

But though every excess of authority is at the hazard of the agent, the principal, by taking the benefit of his act, discharges the agent and embraces the risk himself. Thus, if an agent take upon him to put out his employer's money at interest, unknown to him, and without authority, it is at his own hazard; but the receipt of interest by the principal, with knowledge, is an affirmance by him of the transaction, and exempts the agent from liability, if the security fail.(*c*)

In the next place, an agent is bound to use the utmost diligence and care in the execution of his trust. In the absence of specific instructions, it is his duty to pursue the accustomed course of that business in which he is employed. For an employer has undoubtedly a right to expect from an agent, whom he pays for his service, that, without any particular directions, every precaution ordinarily used for the safety and improvement of his property will be observed. And to this end it is incumbent upon an agent, who receives compensation for his labour, to possess such a competent

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(*b*) Beawes, 41; *Russell* v. *Palmer*, 2 Wils. 325; *Shiells* v. *Blackburn*, 1 H. Bl. 161.

(*c*) *Clarke* v. *Perry*, 2 Freem. Rep. 48; Eq. Ca. Ab. 708. ‡ And see *Prince* v. *Clark*, 1 B. & C. 186, post. ‡

degree of skill and knowledge in his business, as would, in ordinary cases, be adequate to the accomplishment of the service undertaken. (*d*) Thus an agent employed in negociating bills of exchange, is bound, " First, to endeavour to procure acceptance; secondly, on refusal, to protest for non-acceptance; thirdly, to advise the remitter of the receipt, acceptance, or protesting; and fourthly, to advise any third person that is concerned; and all this without any delay." (*e*) (3)

What the usages of each trade are, is the subject of proof as the occasion occurs; unless they are such as, by repeated proof, have come to be recognised by the law; as those which relate to bills of exchange, and some other known instruments of trade. And agents are not only responsible for the performance of these duties in their own persons, but are sureties for those whom they themselves employ in the execution of the service they undertake. (*f*)

(*d*) *Russell* v. *Palmer*, 2 Wils. 325.

(*e*) Beawes, 431. See with respect to attornies, 2 Wils. 325; 4 Burr. 2061; + 3 B. & C. 799. And as to auctioneers, see 3 Campb. 451. +

(3) + The case of a bill-broker is here put, of course, merely as an instance. The rule is of general application; for whoever holds himself out as ready, for a proportionate remuneration, to transact a particular kind of business for others, is presumed to have the requisite skill for such an undertaking. It extends, therefore, to all professional men, as attornies, surgeons, &c. +

(*f*) *Lord North's case*, Dy. 161.

2. The rule that agents are responsible for damage arising from breach of orders, negligence, or incompetence, admits of few or no exceptions in regard to agents who receive hire or reward for their service.(*g*) Yet, independently of this consideration, the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the actual performance of it. Therefore a gratuitous or voluntary agent, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound to exert such a portion of activity and care, as may reasonably satisfy the trust reposed in him.(*h*)

But a gratuitous promise does not render the person making it answerable, as a hired agent is, for neglecting to proceed at all in his undertaking; (*i*) nor is he liable, except for gross negligence; (*k*) nor, lastly, is he bound to possess competent skill for the execution of the service.(*l*) If, however, he possess that skill, he is bound to exert it; and the possession of it will sometimes, from his situation or office, be presumed against

(*g*) *Shiells* v. *Blackburn*, 1 H. Bl. 159.

(*h*) *Coggs* v. *Barnard*, 2 Ld. Raym. 909, and see ✝ Sir Wm. Jones's Treatise on the Law of Bailment, where this subject is fully and elaborately discussed. ✝

(*i*) 2 Ld. Raym. 909.

(*k*) Ib. and see post.

(*l*) 1 H. Bl. 161.

him.(m) (4) These distinctions will be explained more fully in the sequel.(n)

SECTION 3.

1. The responsibility of an agent is not confined to the loss of his commission, but extends to the amount of the damage which the principal suffers, either by direct injury occasioned to his own property,(a) or by his being obliged to make reparation to others.(b) As if a man engage in certain covenants for himself, his servants and agents, the latter knowingly violating those covenants, whereby the principal is charged with the breach of them, are liable over to him.(c)

2. The damage, however, must be a real, and not a supposed or probable injury merely; and

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(m) 1 H. Bl. 161.

(4) ⊥ The doctrine here laid down is scarcely strong enough. If a person undertake to do an act in some *professional capacity*, whether gratuitously or otherwise, the degree of skill and care which is ordinarily requisite for the exercise of such a profession will, it is apprehended, in all cases be expected from him. See *Dartnall* v. *Howard*, 4 B. & C. 345, in which this proposition is assumed. ⊥

(n) Ch. I. Pt. 2.

(a) 2 Moll. 327; Roll. Abr. 105; *Lewson* v. *Kirk*, Cro. Jac. 265.

(b) A verdict obtained against the principal, for the act of his servant, is the measure of damage against the latter. *Green* v. *N. R. Company*, 4 T. R. 490; ⊥ and see *Miller* v. *Falconer*, 1 Campb. 251; *Gevers* v. *Mainwaring*, Holt, N. P. C. 139.⊥

(c) Sid. 298.

therefore an agent is not liable for the neglect of an act expressly directed, if the act, when performed, would not have entitled his employer to any legal benefit; but only have conferred a probability of advantage, founded upon mere courtesy. (*d*)

3. Neither is an agent chargeable for a breach of his instructions, if the compliance would have been a fraud upon others. (*e*) (1) Thus an agent was employed to sell certain articles, and the condition of sale purported that the highest bidder should be the purchaser; but the agent had private instructions not to sell under a certain sum; notwithstanding which, he sold for the highest sum bid, though less than the sum prescribed; and upon an action brought against him by his employer, he had judgment in his favour, since he could not have obeyed his instructions without practising a fraud upon the bidders. (*f*)

(*d*) *Webster* v. *De Tastet*, 7 T. R. 157. ‡ This was an action against a broker for negligence in not insuring, according to directions given, three slaves, allowed to a mate of a vessel in lieu of wages, and lost upon the voyage. The Court held, that as the mate could not have recovered against the underwriters if the policy had been effected, he could not have a larger remedy against the broker, although from the usage it was probable that the insurance, if effected, would have been paid. The passage in the text is not a very happy generalization of this case. See post. ‡

(*e*) *Bexwell* v. *Christie*, Cowp. 395.

(1) ‡ The technical answer to this, and the like cases, is, that the Court will not permit a plaintiff to allege his own fraud. ‡

(*f*) *Bexwell* v. *Christie*, Cowp. 395. But it would have been

4. The law likewise exonerates agents from the consequences arising from their having pursued the regular and accustomed modes of transacting business, although they might, under the particular circumstances, have acted to better advantage.(*g*) This principle is exemplified in several instances which occur in the sequel, and is indeed a just consequence of that responsibility to which they are subjected, by neglecting the prescribed rules of their business. Thus a banker who has received bills from his customer to present for payment, and who takes in payment the acceptor's cheque, which is afterwards dishonoured, has been held to be discharged, because this is the usual course of trade.(*h*)

5. But the mere absence of fraud or bad motive is not sufficient to justify an act detrimental to the employer's interest, unless it be sanctioned by the usual course of business;(*i*) and although the immediate loss be not occasioned by the

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otherwise, if the direction had been to set the article up at the price mentioned, since no fraud would have ensued from that circumstance. Id. ib. (*Howard* v. *Christie*, 6 T. R. 612.)

(*g*) Post. Cowp. 480; *Moore* v. *Morgue*, 2 T. R. 188; *Smith* v. *Cadogan*, *in notis*, *Pitt* v *Yalden*, 4 Burr. 2061.

(*h*) *Russell* v. *Hankey*, 6 T. R. 12; and see Ambl. 219, post, and *Warwick* v. *Noakes*, Peake's N. P 68, post.

(*i*) See this rule as applied to *trustees* exemplified in the case of *Caffrey* v. *Darby*, 6 Ves. Jun. 496, upon the authority of which the position in the text is conceived to be well founded, agents being regarded with less favour than trustees are.

agent's fault,(2) yet if it be such as would not have occurred but for his previous neglect, as if goods be destroyed by fire in a place where they were improperly suffered by him to remain, he is answerable for the consequence.

6. Besides the positive duties that have been enumerated, the confidence necessarily placed by men in those whom they are obliged to entrust with their affairs, has given rise to certain less determinate maxims, calculated to prevent its abuse. Therefore it is established in equity as a general principle, (with few exceptions,) that an agent cannot make himself an adverse party to his principal.(*k*) This is founded upon a plain reason; for even supposing the possibility of his maintaining a strict impartiality between the two opposite interests, yet the employer has not that for which he bargains in the employment, viz. zeal and vigilance for his own exclusive advantage.

This confidence is so highly regarded, that courts of equity have sometimes interfered to set aside improvident grants, made in favour of per-

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(2) ‡ More correctly thus: "although the loss be not an immediate consequence of any fault in the agent." In *Massey* v. *Banner*, 1 Jac. & W. 241; 4 Madd. 413, even a gratuitous agent was charged with a loss occasioned by the failure of his bankers, the money, which had been received under a trust-deed, having been paid in by him *to his own account*, though, so far as appeared, without any intention to misappropriate. ‡

(*k*) Post.

sons confidentially entrusted with the conduct and management of the property so bestowed. On occasion of setting aside a conveyance made under such circumstances, it was said by the Lord Chancellor, "that if the defendant permitted the plaintiff to suppose that he was to take the management of her affairs for her benefit, the known doctrine is, that the fruit of that relation, if it were not absolutely dissolved before the transaction in question took place, could not be permitted to exist."(*l*) If, therefore, a man do not choose to act upon the confidence appearing in the course of the transaction to be reposed in him, he should reject it as soon as proposed.(*m*) And

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(*l*) *Huguenin* v. *Bascley*, 14 Ves. Jun. 299, afterwards affirmed in the House of Lords. There are many cases of this kind arising out of transactions between attornies and their clients. *Newman* v. *Payne*, 2 Ves. Jun. 199; *Wells* v. *Middleton*, cited 9 Ves. Jun. 294; *Gibson* v. *Jeyes*, 6 Ves. Jun. 267; *Walmesley* v. *Booth*, 2 Atk. 25; *Bridgman* v. *Green*, 2 Ves. 627. And it is said, that, independent of all fraud, an attorney shall not take a gift from his client, though the transaction may not only be free from fraud, but the most moral in its nature. Per Lord Erskine. *Wright* v. *Proud*, 13 Ves. Jun. 138. And Lord Eldon, speaking of this relation, says, it is impossible in the course of the connection of attorney and client, that a transaction shall stand, purporting to be a bounty for antecedent duty. *Hatch* v. *Hatch*, 9 Ves. Jun. 296. ⸸ See also *Hall* v. *Hallett*, 1 Cox, 135; *Wood* v. *Downes*, 18 Ves. 120; Ib. 127; 1 Ball. & B. 107; *Jones* v. *Tripp*, 1 Jac. 322; *Williams* v. *Pigott*, 1 Jac. 598; *Pitcher* v. *Rigby*, 9 Price, 79; *Falkner* v. *O'Brien*, 2 Ball. & B. 214; *Rivett* v. *Harvey*, 1 S. & S. 502; *Cane* v. *Ld. Allen*, 2 Dow, 289; *Kenney* v. *Brown*, 3 Ridgway's P. C. 462, 504, 522; ⸸ *Jenkins* v. *Gould*, 3 Russ. 385. ⸸

(*m*) Per Lord Eldon. *Huguenin* v. *Bascley*, 14 Ves. Jun. 294.

not merely agents who are retained for a stipulated reward, but those who officiously or gratuitously undertake the management of another's property, (*n*) are affected by this principle. It seems, however, to have been considered in a recent instance, that a pure gift from an employer to an agent, upon clear evidence of its being the deliberate and well understood act of the donor, with full and accurate intelligence of the value and force of the donation, and under a sense of obligations received, may stand. (*o*) And the rule itself does not apply to agents who are merely employed as instruments in the performance of some appointed service, but is calculated for those who are relied upon for counsel and direction, and whose employment is rather a trust than a service.

SECTION 4.

In addition to the foregoing general duties, which affect all descriptions of agents alike, there are distinct duties depending upon their respective employments, of which the present treatise chiefly concerns such as regard mercantile affairs, referring to those of a different description occasionally, for the sake only of illustration or uniformity.

(*n*) *Proof* v. *Hines*, Forrest. 111.

(*o*) *Harris* v. *Tremenhere*, 15 Ves. Jun. 344; ⊥ *Montesquieu* v. *Sandys*, 18 Ves. 302. ⊥

Of mercantile agents, some are entrusted with the possession, as well as the disposal and management of the property: these are usually denominated *factors*. Others are engaged merely in the negociation of contracts relating to property, with the custody of which they have no concern.(1) *Brokers*(a) are principally of the latter description.

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(1) ↓ See *Baring* v. *Corrie*, 2 B. & A. 137. ↓

(a) Though brokers are often mentioned in the statute law, and many regulations have been enacted respecting them, the law does not seem to have defined what the precise character of a broker is. The stat. 1 Jac. I. c. 21, s. 1, speaks of brokers as employed in the contriving, making, and concluding bargains between merchant English and merchant strangers and tradesmen, concerning their wares and merchandizes, to be bought and sold, and contracted for, and monies to be taken up by exchange between such merchant and merchants, and tradesmen. Sec. 8 of the same statute speaks of brokers in London using and exercising the ancient trade of brokers between merchant and merchant. Several acts of parliament recognise persons making contracts for public or joint stock as brokers, see 8 & 9 W. III. c. 20 and 60; 10 Ann. c. 19, s. 121; 6 G. I. c. 18, s. 21; 7 G. II. c. 8, s. 9. Accordingly one who for hire concludes or bargains in Government or South Sea stock, (*Janson* v. *Green*, 4 Burr. 2104; *Bosworth* v. *Machado*, 2 H. Bl. 556,) is deemed a broker within the 6 Ann. c. 16, s. 5, which mentions persons acting as brokers generally. But merchants acting by commission from correspondents abroad do not seem to fall within this denomination. Per Lord Mansfield, 4 Burr. 2104. One definition that has been given of a broker is, that of a person who makes a private bargain between other persons, but not a public one; Cowel's Interper. and the preamble to 1 Jac. I. c. 21, seems to give the same idea of their employment. Auctioneers therefore are excluded from the description of brokers. *Dub. Wilkes* v.

The first consideration then is, to what extent factors, &c. are responsible for the safety and

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Ellis, 2 H. Bl. 555. Though the term *auctionarii* is said to signify *brokers*. Spelman's Glossary. Blount's Law Dic. Jacob's Law Dic. tit. *Brokers*, tit. *Auctionarii*.

The number of brokers in London is not limited, as at Amsterdam and some other places, but their admission is regulated by statute. By 13 Edw. I. st. 5, *Stat. Civ. Lond.* no brokers shall be in the city of London, but such as are received and sworn by the warden, or lord mayor and aldermen; and by a charter of Edw. III. none were to be brokers but such as were chosen by the merchants belonging to the mysteries in which they were to act (*arg.* 2 H. Bl. 557, and see the preamble to 1 Jac. 1, c. 21). By 6 Ann. c. 16, persons acting as brokers in London must be admitted by the mayor and aldermen, under such restrictions and limitations for their honest and good behaviour as the said court shall think fit, and shall pay 40*s*. upon admission, and the same sum annually, under a penalty of 25*l*. for acting without. (2)

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(2) [In 1708, the year after the passing of the statute of Anne, the Court of Mayor and Aldermen of the City of London made certain rules and regulations for the government of brokers, which have since been and are still in force, and by virtue of which every person, before being admitted a broker, is required to enter into a bond to the Mayor, Commonalty and Citizens of London, in a penalty of 500*l*. and also to take an oath, the forms of which are prescribed by the same rules and regulations. The condition of the bond, amongst other things, provides, "That the broker shall, upon every contract by him made, declare and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereunto required, and that he shall not directly or indirectly, by himself or any other, deal for himself in buying any goods, wares, or merchandizes, to barter or sell again upon his own account, or for his own benefit or advantage, or make any gain or profit in buying or selling any goods, over and above the usual brokerage." See the condition of the bond, and the form of the oath at length, in Merivale's Rep. 156, 157, and in 1 Holt's N. P. C. 431, 432, 433. In a late case, where the condition of the bond was brought under the consideration of the Court of Common Pleas, it was held, that if a broker be authorised by his principal to make a purchase for him in his (the broker's) own name, and the contract note be accordingly made out in the broker's name, without inserting that of his principal, such a purchase by the broker does not operate as a breach of the condition of his bond, especially where the broker

preservation of goods, either in their actual custody, or committed to their protection,

A factor is not answerable against all events for the safety of goods which he has in charge; but it is sufficient if *he do all that by his industry he may* for their preservation.(*b*) The criterion

The commission of brokers on contracts for any stock erected by Act of Parliament or letters-patent, is limited by 10 Anne, c. 19, s. 12, to 2*s*. 9*d*. per cent.; and by Sir John Barnard's Act, 7 G. II. c. 8, s. 9, every Stock Broker is to keep a book called the *Broker's Book*, in which he shall enter all contracts, agreements, &c. for stock made by him on the same day, with the names of the parties, and the day of making the contract; which book he shall produce when lawfully required. And there is an instance in which on appeal to the House of Lords, in a question relative to the purchase of stock, the broker appearing to have misbehaved himself in his business, by not keeping books of the contracts made by him pursuant to 7 G. II. c. 8, the house ordered that it should be recommended to the Court of the Lord Mayor and Aldermen to sue him upon the bond given for the performance of his duty as a broker. *Dunbar* v. *Wilson*, 6 Bro. P. C. 6. Ed. 1784.)

(*b*) *Vere* v. *Smith*, 1 Vent. 121; Co. Lit. 89.

enters the name of his principal, as being the buyer, in the book kept by him for that purpose. *Kemble* v. *Atkins*, 7 Taunt. 260; 1 B. Moore's Rep. 6, S. C. Neither does the condition of the bond absolutely prohibit a broker from dealing as a trader on his own account, but it only operates as a prohibition *sub modo*, that is, it imposes upon him a penalty in the event of his trading. But if, in any transaction in which he is really engaged as a principal, he act ostensibly as a broker, such conduct is a gross fraud, in respect of which he can obtain no remedy in a court of justice. *Ex parte Dyster*, 1 Merivale's Rep. 155; 2 Rose's B. C. 349, S. C.] ‡ The condition of the bond also prohibits the broker from employing any person *under* him as a broker who has not been duly admitted— a prohibition which of course does not in terms extend to the case of a person concurring with the broker *as a partner* in the making of contracts. *The Lord Mayor of London* v. *Brandon*, 2 Stark. N. P. C. 14; 1 Holt, N. P. C. 438, S. C. ‡

seems to be, that he keep them with the same care as he would his own.(*c*) (3) He is not liable in cases of robbery,(*d*) fire,(*e*) or any other accidental damage happening without his default.(*f*) But though the immediate cause of the loss be one which no care could prevent, as lightning or the like, yet if improper delay in the removal of the property had previously intervened, it is not

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(*c*) *Coggs* v. *Barnard*, 2 Lord Raymond, 917; Holt, 131, S. C. Moor, 462; *Woodlif's case*, 7 Vin. Ab. 7, cont. In this respect factors differ from carriers and innkeepers. But the liability of the latter is founded upon a notion of public trust and employment. 2 Lord Raymond, 917. It is said indeed, *Southcote's case*, 4 Co, 84, that hire is the foundation of the carrier's liability, which reason, if it were the true one, would equally affect factors; but see 2 Lord Raymond, 916.

The same rule has been laid down with regard to *auctioneers*. *Maltby* v. *Christie*, 1 Esp. Cas. 341.

(3) ↓ The criterion given in the text is not quite accurate. It is not sufficient in all cases that a factor or other depositary for hire, should keep the goods entrusted to him with the same care as he would his own; for possibly he might keep his own very negligently, and it would be no excuse for the loss or damage of his employer's goods, that he had been equally careless as to his own. The rule is, that he is bound to keep them with as much care as a man of *average prudence* would bestow in the keeping of his own. See Sir Wm. Jones on the Law of Bailment, and the references there made to the civil law, upon which the doctrine of our law is in this respect avowedly founded. ↓

(*d*) See note (1), Co. Lit. 88 b.

(*e*) *Anon.* 2 Mod. 100.

(*f*) *Anon.* 2 Mod. 100. It is a good discharge before auditors for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast overboard into the sea. Roll. Abr. 124; Bro. tit. Account, 10.

excused by the nature of the accident.(*g*) (4) Though it be [is] in general true, that the trust reposed in an agent is personal, and intransferable, yet reasonable convenience, and attention to the benefit of his employer, will often justify him in delegating the custody of goods to another; provided due care is [be] taken to select a proper depositary. Thus to an action of account for goods delivered to the defendant *ad merchandizandum*, he pleaded that he carried them to Porto Bello, and, in order to keep them safe, he put them into the warehouse of the South Sea Company, which was broken open, and the goods taken away. Though it were [was] objected, that the defendant had undertaken a special and particular trust, and having committed the goods to the care of a third person, which he could not do, must be answerable for the loss; yet it was decided in his favour, the Court declaring that a bailiff *ad merchandizandum* is not obliged to keep the goods always about him; and that if the warehouse were [was] not a place of safe custody, that should have been replied.(*h*) (5)

(*g*) *Caffrey* v. *Darby*, 6 Ves. 496.

(4) ┼ This is a general rule applicable to all cases of bailment.┼

(*h*) *Goswell* v. *Dunkley*, 1 Str. 681. And see *Bromley* v. *Coxwell*, 2 Bos. & Pull. 438.

(5) ┼ The question will be, "has he done that which under the circumstances was prudent and warranted by the usage of trade."┼

2. One of the most important duties which the safety of merchandize requires, in factors and consignees who act as factors, is that of protecting it by insurance.

Where the course of dealing between the principal and agent is such, that the latter has been used to effect insurances, by directions of the former, he is bound to comply with an order to insure, though he has [have] no effects in hand at the time of receiving the order; unless notice has been previously given by him to discontinue that mode of dealing.(*i*) But if he have effects in hand, he cannot in any case refuse to comply with the order.(*k*) Or if the bills of lading from which his authority is derived contain an order to insure, this is an implied condition which the agent must fulfil, if he accept the employment.(*l*)

If in any of these cases the agent neglect to make insurance, he is himself, by the custom of merchants, to be considered as the insurer, and liable as such in the event of loss.(*m*) If no

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(*i*) *Smith* v. *Lascelles*, 2 T. R. 189; Beawes, 43.

(*k*) Id. ib. (*l*) Id. ib.

(*m*) *Wallace* v. *Telfair*, 2 T. R. 188, *in notis;* Mal. 86; Beawes, 43; 1 T. R. 24; *Delaney* v. *Stodart*, 2 Ves. 239. If he [the agent] limit the [insurance] broker to too small a premium, by which no insurance is effected, he is liable [to his principal]. *Wallace* v. *Telfair*, 2 T. R. 188, note. ╀ And where the broker negligently omits to have the usual clauses inserted in the policy, he renders himself liable to the assured for any loss he may sustain thereby. *Park* v. *Hammond*, 6 Taunt. 495; *Mallough* v. *Barber*, 4 Campb. 150.╀

available insurance be effected, it is the same as if none at all were made. (n)

It has been held that, although no advantage can be taken of a gratuitous promise to procure insurance, in case of a total neglect to do so; yet, that if a voluntary agent actually proceed to make insurance, but through his gross mismanagement the benefit of it is lost, he is answerable for the injury sustained. (o) (6)

In an action against an agent for a failure in making insurance, as he stands in the place of an insurer, (p) so he is entitled to any defence which an insurer could have made: for if nothing could have been recovered upon the policy, no actual damage has been sustained by default of it. The plaintiff therefore in such an action must recover according to his interest, (q) which, as well as the

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(n) Ante, note (m).

(o) *Wilkinson* v. *Coverdale*, 1 Esp. Cas. 74; *Seller* v. *Work*, Marshall, 208, 3d ed. 305.

(6) ‡ This also is a rule of general application founded on the clearest principles of equity and expediency. If a man *gratuitously* undertake to do a service for me, although morally it may be wrong in him not to fulfil that undertaking, it is manifest that I have no *right* to enforce the performance. But if he do in fact proceed to the execution of what he has undertaken, it is equally manifest that for gross neglect or mismanagement in the execution he ought to be answerable, inasmuch as I have sustained an injury by being induced to repose in him a trust which might have been punctually fulfilled by another. ‡

(p) Ante, note (n).

(q) *Harding* v. *Carter*, Park, 4; *Delaney* v. *Stodart*, 1 T. R. 24.

loss, he must establish in proof: and the defendant may avail himself of a *deviation* in the voyage;(r) or the illegality of the intended insurance;(s) ‡ or any other defence of the like nature.‡ And if the policy, being illegal, could not in point of law have been enforced, it makes no difference that in fact such insurances are frequent, and always paid without objection.(t) If the neglect complained of be, that by the non-communication of a material fact to the underwriters, in making the insurance, the policy was avoided, the agent may make it appear, by way of defence, that the fact, if communicated, would have made it impossible to get insurance at the premium limited in his instructions. Thus a shipowner in London directed a broker at Hull to insure a ship, then on a voyage from London to Hull, *limiting the premium to be given*, and communicating the day of the ship's sailing from London. The broker effected the policy without any delay, but concealed the day of the ship's departure. Upon that ground, the assured having been nonsuited in an action brought upon the policy, brought another action against the broker for neglecting to make the

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(r) *Delancy* v. *Stodart*, 1 T. R. 22.

(s) *Webster* v. *De Tastet*, 7 T. R. 157. In that case, the object of the insurance was a bonus to be paid to a seaman at the end of a voyage, which is not an insurable benefit. See ante, p. 8, n. (d).

(t) Id. ib.

proper communication, in which the latter was permitted to show in his defence, that no insurance could have been made at the limited premium, if the date of the ship's departure had been communicated, that date being such as would have made her be considered a missing ship at the time the order was received.(*u*) (7)

If the agent do all that is usually done to get the insurance effected, it is sufficient. For he is no insurer, and not bound to procure insurance at all events.(*v*) Accordingly where an agent, having ineffectually endeavoured to get an insurance at the usual places, was obliged to employ another person, who got it done, but refused to give up the policy, and became insolvent after receiving the money from the underwriters, the first agent was held to be discharged, for it was not incumbent upon him to bring an action for the detention of the policy.(*w*) Upon the same principle, if the employer desire to have the insurance made at any certain office, in preference to others, he must express it in his instructions: for under a general order, an agent is justified in

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(*u*) *Anon.* cor. Chambre, J. York Summer Ass. 1808.

(7) ┼ The case of an insurance broker is here put as an illustration, for there is no doubt that the same or a like defence would be open to a factor or correspondent who had the charge of goods. ┼

(*v*) *Smith* v. *Cadogan*, 2 T. R. 188, note.

(*w*) Id. ib.

applying to any of the accustomed and reputed offices, though, from the nature of the commodity to be insured, a greater risk be covered for the same premium by some, than by other offices. (*x*)

The policy may be effected by the agent in his own name; and it is not necessary that he should be described in it "as agent."(*y*) It is, however, necessary, if the name of the agent only be inserted, that he should appear in evidence, (and it is usually so averred in the declaration,) to come within one of the following descriptions of the statute 28 Geo. III. c. 56, viz. either the consignee, or the person residing in Great Britain, who shall receive the order for, and effect the insurance; or the party giving the order to the person immediately employed. (*z*) It is a sufficient compliance with this act, that the name of the broker employed by the consignees to effect the insurance, is inserted in the policy. (*a*) Also, where upon the refusal of the consignee of a cargo to receive it, a general agent [in this country] of the owner who resided abroad, took upon himself, without any instructions, to insure it in his own name, which was approved by the owner

(*x*) *Moore* v. *Morgue*, Cowp. 479; *Comber* v. *Anderson*, 1 Campb. 253.

(*y*) *Bell* v. *Gilson*, 1 B. & P. 346, note; *De Vignier* v. *Sanson*, Park, 19. (*Mellish* v. *Bell*, 15 East, 4.)

(*z*) 28 Geo. III. c. 56.

(*a*) *Bell* v. *Gilson*, 1 B. & P. 345.

upon notice of it, the policy was deemed sufficient within this act.(*b*) (8)

The policy, when effected, becomes the property of the insured; and, if wrongfully withheld by the agent, an action of trover lies for it. And though no policy had in reality been effected, yet the broker, having represented to his principal that it had, was not allowed, in an action of trover for the policy, to contradict that representation, (although alleged to be made by mistake of his clerk,) in order to let in the objection, that trover could not be maintained for that which had never existed.(*c*)

SECTION 5.

Where duties are payable upon the importation or exportation of goods, it is the business of the

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(*b*) *Lucena* v. *Crawfurd*, 2 Bos. & Pul. N. R. 291.

(8) ┼ "To make a man an agent in such a case, he must either have express directions from the principal to cause the insurance to be effected, or else it must be a duty, arising from the nature of his correspondence with the principal. And no general authority which he may have in relation to a ship or goods will make him an agent for the purpose of insuring for the parties interested. Therefore a ship's husband, regularly appointed by deed executed by all the owners, with power to advance, lend, &c. to make all payments, and to retain all claims, &c. has no right to make insurance for all or any of the part owners without a general direction from all, or a particular direction from each."—Marsh. Ins. 3d ed. 303.┼

(*c*) *Harding* v. *Carter*, Park, 4; ┼*Ticel* v. *Short*, 2 Ves. 229.┼

factor or agent employed in the receipt or dispatch of them, to take care that the proper entries are made, and the duties satisfied. For if, by reason of a false or imperfect entry,(*a*) or by being landed before the customs are paid or compounded,(*b*) the goods be forfeited, the factor is liable to answer for the loss,(*c*) unless, indeed, the entry be pursuant to the invoice, or letters of advice, for then it is not his fault.(*d*).

The extent of this liability is said by *Malyne* to be that of the *cost* price of merchandize to be exported, or the *sale* price of that which is to be imported, with reference to the country where the seizure is made.(*e*)

It is in consideration of this responsibility, that it has been thought that the factor is entitled to charge foreign customs as paid, and to have the benefit to himself, if he can find means to evade the payment of them; but not so of home customs.(*f*) This opinion, however, has been treated as questionable.(*g*) (1)

(*a*) *Lewson* v. *Kirk*, Cro. Jac. 255; Cha. Ca. 25.

(*b*) 4 Bac. Ab. 599, tit. Merchant, B.

(*c*) *Lewson* v. *Kirk*, Cro. Jac. 255.

(*d*) Moll. 329.

(*e*) Mal. Lex. Merc. 83; 13 Vin. Ab. 4.

(*f*) *Smith* v. *Oxenden*, and *Borr* v. *Vandall*, Eq. Ca. Abr. 369, 370; *Boulton* v. *Arlsden*, 3 Salk. 235; but Lord Keeper North disapproved the doctrine altogether; 13 Vin. 4.

(*g*) 13 Vin. Ab. 3, see post.

(1) ⊥ And surely is unsupportable, see post.⊥

SECTION 6.

To consider, in the next place, the duty of agents, in respect to contracts made by their intervention, it is necessary to premise, that contracts of this description give rise to two questions, which must be kept wholly distinct, viz. 1st, as between the principal and agent, whether the latter have faithfully discharged his duty; 2ndly, between the principal and the third persons, whether the contracts be binding upon him; for many cases occur where a principal is obliged by acts not done pursuant to his authority. (*a*) The first only is the subject of our present consideration.

And, first, of the contract of sale. ⸸ An agent must strictly pursue his authority; and therefore a factor authorised to sell has no right to barter. (1) As for the price, ⸸ if none be limited by the instructions, it should be the agent's endeavour to obtain the best which the thing sold is fairly worth; and to this end he is bound to exert that degree of vigilance and intelligence, which might be expected from a prudent person in the management of his own business. (*b*)

If, however, a price be fixed, from which he is

(*a*) *Runquist* v. *Ditchell*, 3 Esp. Cas. 64.

(1) ⸸ *Guerreiro* v. *Peile*, 3 B. & A. 616. ⸸

(*b*) Beawes, 43.

not at liberty to depart, he will not be justified in selling for a less, (c) unless, as in the case already mentioned, where the mode of sale directed to be used would make a secret limitation of the price a fraud upon purchasers. (c)

2. It seems to have been formerly thought, that a factor or agent, by virtue of a general commission to sell, was not justified in selling upon trust. (d) But whatever may have been the law formerly, it is now settled, agreeably to the principle which governs every part of an agent's duty, that the usage of trade affords the true rule in this respect. (e) The law is thus stated by Lord Chief Justice Holt: "A factor of common right is to sell for ready money: but if he be a factor in a sort of dealing or trade, where the usage is for factors to sell upon credit, there, if he sell to a person of good credit at the time, and he afterwards become insolvent, the factor is discharged; but otherwise, if it be to a man notoriously discredited at the time of the sale. (f) But if there be no such usage, and he upon a general authority sell upon trust, let the vendee be ever so able, the

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(c) *Bexwell* v. *Christie*, Cowp. 395.

(d) *Barton* v. *Saddocks*, 1 Bulst. 104; *Anon.* 2 Mod. 100.

(e) *Scott* v. *Surman*, Willes, 407; *Houghton* v. *Matthews*, 3 Bos. & Pull. 489.

(f) *Anon.* 12 Mod. 514; per Holt, C. J.; *Dodridge* v. *Anthony*, Winch. 53; *Capp* and *Tucker's case*, 2 Roll. 497; and see *Wiltshire* v. *Sims*, 1 Campb. 258, and Dy. 29 a.

factor only is chargeable."(*g*) This doctrine will be more fully considered in discussing the obligation of contracts made by agents.

But, notwithstanding any usage of trade, an agent is not warranted in selling upon a credit to a person whom he knows at the time to be insolvent, unless specially directed to sell to him.(*h*) The notorious discredit of the vendee, as appears from the opinion just cited of Lord C. J. Holt, is a reason for charging the agent.(*i*) And if he sell goods of his own to the same person for ready money, that is a strong circumstance from which to argue his knowledge of the vendee's insolvency, though it is said not to be sufficient alone to charge him in an action.(*j*)

The time of credit must, in all cases, be reasonable and customary; (*k*) and the security such as the principal may avail himself of by reasonable diligence, and without extraordinary risk or trouble.(*l*)

3. When the contract for sale is concluded, the principal ought regularly to have notice of it. It is alleged by Malyne, that if the factor have not given notice to his principal of the bargain in

(*g*) See note (*f*), preceding page.

(*h*) Yelv. 202; *Sadock* v. *Burton*, Malyne, 83.

(*i*) 12 Mod. 514, ante, (*f*)

(*j*) Moll. 239.

(*k*) Bulstr. 103; *Barton* v. *Saddocks*, Moll. 328.

(*l*) Bulstr. 104; *Barton* v. *Saddocks*, Yelv. 202; Winch. 53.

convenient time, and the vendee become insolvent, the factor is responsible.(m)

If payment be made to an agent resident in a foreign country by bad money, the loss, it is said, falls upon him; but it is otherwise if he take in payment money which is afterwards depreciated by edict or proclamation.(n)

It will be seen more at large, in a subsequent part, under what circumstances an agent is discharged by depositing the money received on the sale, in hands which happen to fail.(o)

SECTION 7.

We come now to treat of purchases made by agents.—It is laid down by the writers upon commercial law, that if a factor, in the execution of a commission to purchase, deviate from his orders in price, quality, or kind; or if, after they are bought, he send them to a different place from what he was directed, they must remain to his own account, except the merchant, on advice, admit them according to his first intention.(a) And it appears from the following case,(b) which also confirms the rule just mentioned, that the principal, *if he have advanced money upon the goods*, is

(m) 13 Vin. Ab.; 4 Beawes, 43.

(n) Moll. 424.

(o) Post.

(a) Malyne, 82; Beawes, 43; 13 Vin. Ab. 6.

(b) *Cornwall* v. *Wilson*, 1 Ves. 509.

not obliged, in rejecting the contract, to return them into his agent's hands, but may [take upon himself to] dispose of them *as agent for the latter.* The defendant, a merchant in London, gave orders to the plaintiffs, his factors at Riga, to buy hemp at a limited price; the plaintiffs exceeded that price, and the hemp coming to England, the defendant refused the contract, but, however, disposed of the hemp. The question was, in what manner the defendant should account to the plaintiffs; whether for the whole price paid by them, or only for so much as the hemp sold for. Lord Hardwicke, in his judgment, expressed himself thus: "The defendant insists, that the plaintiffs having exceeded their orders as factors, in which they are not warranted, he is justified in refusing the contract, and turning it on the plaintiffs themselves. making them principals; to prove which, merchants have been examined on both sides, and the result is, that if a factor have not a general, but a limited authority, to purchase at a certain price, if he exceed that, his principal is not bound to adopt the contract, and accept the goods, and reason agrees therewith." And afterwards, "it is very true and reasonable that a merchant here, refusing the goods sent over by his factor in a foreign country, who exceeds his authority, *having advanced his money on those goods,* may act thereon as a factor for that person who broke his orders."

2. This, it will be observed, was the case of a

factor resident abroad, which differs materially from one in which the residence of the parties would admit of the goods being instantly returned without great injury. The following opinion, declared by Lord Eldon, seems to afford a safe guide upon this subject: "That if a man, under a contract to supply one article, supplies another, under such circumstances that the party to whom it is supplied must remain in utter ignorance of the change till the goods are in a situation in which it would be against the interest of the other to return or reject them, instead of doing what is best for him, namely, selling them immediately, a jury would have no hesitation in saying, that he may be considered, if he please, not as a purchaser, but as placed by the vendor in a situation in which, acting prudently for him, he might be looked upon as his agent."(c) And again it is stated by the same authority, as a general principle, "that where there is a contract of sale and delivery, and the goods might, from the nature of the contract, be re-delivered, if, under the circumstances, they cannot be re-delivered, an equity arises from this, namely, that the party cannot protect himself at law, as he cannot re-deliver, and he was led into that by the misrepresentation of the other.(d) (1)

(c) *Kemp* v. *Prior*, 7 Ves. Jun. 240.

(d) Id. ib. 242.

(1) ┼ It may be necessary to explain this dictum. The question was, whether a court of equity could interfere, the subject-

3. But if the principal elect to proceed in this manner, he must, from the first, decisively reject the contract, for he will not be allowed, after endeavouring to turn the goods to account, to return them upon the factor's hands. Therefore, in the case already quoted, the principal, though he had expressly, by letter, disaffirmed the contract, yet, having shipped the goods on a new risk, instead of disposing of them in London, where it was proved there was a market for them, he was held to have waived the right of disowning them, and was decreed to account with the factor for the whole price.(*e*) ⊥ And in all cases of a departure from instructions, the principal is bound to notify his rejection to the factor or his agent *within a reasonable time* after intelligence received of the purchase; otherwise he will be presumed to have adopted the transaction, and the loss, if any, will fall upon him.(2)⊥

4. The above case of *Kemp* v. *Prior* also furnishes

matter being properly cognizable by a court of law. Lord Eldon therefore says, "A court of law could not give relief, because at law, to make the rejection of the principal complete, it ought to be shown that the goods were re-delivered. Now the goods could not, in this case, have been re-delivered, without great loss, to the agent himself; and hence arises an equity on behalf of the principal, that he, for the sake of the agent himself, not having re-delivered, but having taken upon him to act for the agent in disposing of the goods, shall not be a sufferer by such conduct, but shall stand, as to the fact of rejection, on the same ground as if he had actually re-delivered them."⊥

(*e*) *Wilson* v. *Cornwall*, 1 Ves. 509.

(2) ⊥ *Prince* v. *Clarke*, 1 B. & C. 186. ⊥

us with Lord Hardwicke's opinion upon another point, material to this question. It seems to be there intimated, that if the exceeding in price be for the purpose of effecting, and do effect an equal saving upon the same goods in some other respect in which the factor was not limited, in equity the principal is bound to take to them. The order was given to a foreign factor to purchase hemp at a certain limited price, but without any directions as to the freight. It happened that the price of the freight was rising more than the price of hemp was falling, which induced the factor, instead of waiting till the article fell to the price limited, to purchase somewhat higher than his orders, and ship immediately, in order to profit by the then lowness of the freight, thereby, as it appeared, saving more in the freight than the excess of price; and Lord Hardwicke said he was inclined to think, that if the case had stood singly upon this state of facts, the factor did right.(*f*)

If a factor buy a commodity which afterwards becomes damnified, he is not answerable for the loss. But, according to Malyne, "if the commodity were *damnified before*, then he is to bear some part of the loss, though it happened to be known afterwards."(*g*)(2)

(*f*) *Wilson* v. *Cornwall*, 1 Ves. 509. (*g*) Malyne, 84.

(2) ⊥ Would not this rather depend on the question whether he had exercised due skill and caution in the purchase of the commodity? In *Mainwaring* v. *Brandon*, 8 Taunt. 202, the defend-

5. It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell cannot make himself the purchaser;(*h*) nor, if employed to purchase, can he be himself the seller. (*i*) The expediency and justice of this rule are too obvious to require explanation. For with whatever fairness he may deal between himself and his employer, yet he is no longer that which his service requires, and his principal supposes and retains him to be,—he acts not as an agent, but as an umpire. (3) If, therefore, a purchase by an agent employed to sell can in any

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ants had been employed as brokers by the plaintiff, who was the foreign factor of a house in Holland, to purchase tobacco in the foreign market. The tobacco was bought and shipped to Holland, but on arrival was found to be so bad, that the Dutch house sued the plaintiff, and recovered damages. The plaintiff thereupon brought his action against the defendants; and it having been proved at the trial that the tobacco might have been discovered on inspection, at the time of sale, to be altogether unmarketable, he was allowed to recover the whole amount of damages and costs which had been obtained against him, returning, of course, the tobacco to the defendants. ‡

(*h*) *Lowther* v. *Lowther*, 13 Ves. 103. By 31 G. II. c. 40, s. 11, salesmen, brokers or factors, employed to buy or sell cattle in London, are prohibited from buying or selling on their own account, under penalty of double the value.

(*i*) Post.

(3) ‡ And on the same ground of manifest inconsistency, neither party to a contract can be recognised as doing any act necessary to the validity of that contract in the character of agent to the other party. See *Wright* v. *Dannah*, 2 Campb. 203; *Dixon* v. *Bromfield*, 2 Chitty's Rep. 205.‡

case be supported, it must be where the agent makes it fully appear both that he furnished his employer with all the knowledge which he himself possessed, (*k*) and also that he was known to be the purchaser. (*l*) It is not alone enough that he was known to be so, according to the opinion expressed by Lord Thurlow in the following case. (*m*) The

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(*k*) *Lowther* v. *Lowther*, 13 Ves. 103; *Wren* v. *Kirton*, 8 Ves. 502; see post, p. 37, (*n*).

(*l*) *Coles* v. *Trecothick*, 9 Ves. 234; *Morse* v. *Royal*, 12 Ves. 355.

(*m*) *Crowe* v. *Ballard*, 3 Bro. C. C. 119.

This rule is the same, and founded upon similar principles, as that which holds in the case of trustees. Indeed, every agent for sale, if confidentially entrusted beyond the mere performance of the service, is in the nature of a trustee. It may be proper, therefore, to refer to the leading cases upon this head relative to trustees. It seems at one period to have been held, that, in order to invalidate a purchase by a trustee, there should be evidence that some advantage had been made by the trustee. *Wichcote* v. *Lawrence*, 3 Ves. Jun. 740, per Lord Roslyn. At another, the rule is said to be, that any trustee purchasing the trust property, is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* choose to say he is not satisfied with it. *Campbell* v. *Walker*, 5 Ves. Jun. 680, per Lord Alvanley, Master of the Rolls. It seems at present to be understood, that a trustee for sale may be the purchaser in this sense, viz. he may contract with his *cestui que trust*, that, with reference to the contract of purchase, they shall no longer stand in the relative situation of trustee and *cestui que trust;* and the trustee having, through the medium of that sort of bargain, evidently, distinctly, and honestly proved that he had removed himself from the character of trustee, his purchase may stand (per Lord Eldon, *Campbell* v. *Walker*, 13 Ves. Jun. 601); but that, unless the connection appear to be thus satisfactorily dissolved, (which will be watched with great

defendant, who was employed to sell a reversionary legacy, purchased it for himself in another

jealousy,) it is in the choice of the *cestui que trust* whether he will take back the property, though the trustee have reaped no advantage. *Ex parte Lacey*, 6 Ves. Jun. 626, 627; *Ex parte James*, 8 Ves. Jun. 348. ⊥ For instances where purchases by, or conveyances to, persons standing in the relation of trustees, have been set aside, the reader is referred to the following cases in addition to those already cited. *Randall* v. *Errington*, 10 Ves. 423; *Att. Gen.* v. *Lord Dudley*, Cooper, 146; *Downes* v. *Grazebrook*, 3 Mer. 200; *Watson* v. *Toone*, 6 Mad. 153; *Cook* v. *Collingridge*, 1 Jac. 607; *Watt* v. *Grove*, 2 Sch. & Lef. 492; *Mulvany* v. *Dillon*, 1 Ball & B. 418; *Dunbar* v. *Tredennick*, 2 Ball & B. 304. Sometimes the lapse of time has disinclined the Court to interfere. *Gregory* v. *Gregory*, Cooper, 201, affirmed 1 Jac. 631; *Whatton* v. *Toone*, 5 Mad. 54; *Chalmer* v. *Bradley*, 1 Jac. & W. 59.⊥

This rule applies, with particular strictness, to assignees and solicitors, under commissions of bankruptcy, buying any part of the bankrupt's estate. *Ex parte Lacey*, 6 Ves. 625; *Ex parte James*, 8 Ves. 337. ⊥ See further, *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Harris*, 1 Buck, 17; *Ex parte Spong*, 1 Rose, 133; *Ex parte Bage*, 4 Mad. 459; *Ex parte Hodgson*, 1 G. & J. 12.

Under what circumstances assignees may be permitted to bid, see *Anon.* 2 Russ. 350; *Ex parte Morland*, 1 M. & M. 76.

As to purchases by attornies or solicitors from their clients, see ante, p. 11. The distinction between attorney and trustee to sell, as to contracts with the client or *cestui que trust*, is stated to be this: that an attorney, though retaining that character, may contract, subject to the onus of proving that no advantage was taken of his situation. But for a trustee, it is not sufficient to show that he has not taken advantage; the general rule being, that he must first divest himself of the character altogether. *Cane* v. *Lord Allen*, 2 Dow, 289. ⊥

Coles v. *Trecothick*, 9 Ves. 234, and *Morse* v. *Royal*, 12 Ves.

name, and afterwards sold it again to the legatee, the original seller, by whom a bond was given for the purchase-money, and interest paid thereon for some years. On a bill filed to have the bond delivered up on payment of the sum really advanced, the whole transaction was deemed fraudulent, and the execution of the bond, and payment of interest, no confirmation. The Lord Chancellor remarking the fact, that the defendant was himself the purchaser, says, "that alone is sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy. Even if this were done with the knowledge of the party selling, it could not be supported. That principle must prevail, even if he had bought it fairly." And it was stated, on a very recent occasion, "that the principle upon which a court of equity acts, in cases of this kind, which has been settled in many instances, and rests upon the clearest grounds of equity and the general security of contracts, is, that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself pos-

355, explain under what circumstances the purchase of a trust property may be confirmed. ┼ See also *Naylor* v. *Winch*, 1 S. & S. 566; *Lord Selsey* v. *Rhodes*, 2 S. & S. 49. ┼

sessed."(*n*) If, however, the Court, in the exercise of its discretion, see reason to be convinced that by re-opening the sale the price would fall short of the sum given, that may afford a ground for upholding the sale.(*o*)

6. It has been said that the same principle operates upon agents employed to purchase.—The undertaking of an agent employed at a certain commission or salary to purchase for the use of his principal, is to buy in the most beneficial manner for him; and therefore it is declared to be contrary to the duty and trust of a (*p*) person in that situation to be himself the seller, unless it be so understood by plain and express consent.(*p*) It is obvious that the character of a seller is incompatible with diligence and exertion in obtaining goods at the lowest price.(4)

An agent, therefore, who deals as a merchant without the express consent of his principal, is accountable to him for the profits made by this indirect dealing, that is, for the surplus charged by him above the prime cost of the article sup-

(*n*) *Lowther* v. *Lowther*, 13 Ves. 103; ↓ and see *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *Whitcombe* v. *Minchin*, 5 Mad. 91; *Oliver* v. *Court*, Dan. 301; 8 Price, 127; *Woodhouse* v. *Meredith*, 1 Jac. & W. 204; 2 Ball & B. 319.↓

(*o*) *Wren* v. *Kirton*, 8 Ves. 502.

(*p*) *Massey* v. *Davies*, 2 Ves. Jun. 317.

(4) ↓ Upon the same principle, an agent employed to buy, having purchased for himself, was decreed in equity to stand as trustee for his principal. *Jones* v. *Davids*, 4 Russ. ↓

plied, though not more than the principal must have paid to any other merchant. This principle is particularly recognised by Lord Thurlow upon occasion of a bill filed by the East India Company against one of their servants for an account of profits made by supplying the Company with silks under a collusive contract with the board of trade. "If, being a factor, he buy up goods which he ought to furnish as factor, and instead of charging factorage duty, or accepting a stipulated salary, he take the profits, and deal with his constituent as a merchant, this is a fraud for which an account is due."(q) And in a subsequent case, an agent employed to furnish timber for a colliery, at a certain stipulated salary, was decreed to account for profits made by selling his own timber to his principals under the name of another person with whom he had clandestinely engaged in a partnership.(r) And not only the agent himself who betrays his trust, but the merchant, who, knowing the agent to be guilty of a breach of duty, enters into the transaction with him,(s) or by collusion obtains a price he ought not to have had, is liable to account in equity, as for a fraud.(t)

7. It is of consequence to an agent, in consulting his own indemnity, to apprise his principal, with convenient expedition, of all material acts

(q) *East Ind. Comp.* v. *Henchman*, 1 Ves. Jun. 289.
(r) *Massey* v. *Davies*, 2 Ves. Jun. 317. (s) Ib.
(t) *East Ind. Comp.* v. *Henchman*, 1 Ves. Jun. 289.

done or contracts concluded by him. It must, in general, be a question to be decided according to the particular circumstances of each case, whether the culpable delay of the agent, in this respect, have occasioned an injury to the principal; but, in general, it is incumbent upon him to give the earliest notice of such things as may make it necessary for the principal to take steps for his own security. Thus an agent, to whom a bill of exchange is remitted to present for acceptance, ought to give notice by the first post of the acceptance or refusal.(*u*)

SECTION 8.

The responsibility of factors, or other agents, for the price of goods, &c. sold by them, or the produce of any contracts made by them, does not, by the common terms of their employment, attach till it is received; unless where they have improperly sold upon credit, as has been already mentioned; or, secondly, where the delay of payment has been occasioned by their neglect. And in an action against an agent for the price of goods sold by him, Mr. J. Buller declared it as his opinion, that if an agent employed to sell receive part only of the price, the principal cannot maintain an action for it till the transaction be

(*u*) Beawes, 431.

closed, unless it appear to be his fault that the rest of the price is not recovered. For, if a contrary practice were to prevail, there might be many actions brought where one cause of action only existed.(*a*)

‡ If the agent admit that he has received the money, as by taking credit in account with the debtor, he is thenceforth precluded from saying, as against the claim of his principal, that the money has not been received.(1) ‡

2. An agent acting under a *del credere* commission is answerable to his principal for the produce of sales, or other contracts, effected by him, without any regard to whether he has received it.

(*a*) *Varden* v. *Parker*, 2 Esp. Cas. 710. Whether in that case any part of the price had been received, or whether the whole were [was] unpaid, the report does not state. But the opinion of the learned judge stated in the text implies, that part, but not the whole, had been received; for if the fact had been merely that no part had been received, that opinion would have been superfluous. ‡ Very little reliance can be placed on any case which rests on the authority of these reports. The proposition in the text is, to say the least, questionable. ‡

(1) ‡ *Andrew* v. *Robinson*, 3 Camph. 199. And it has been said by Lord Ellenborough in one case, that "it is not necessary to prove that the agent actually received the money, in order to entitle the principal *to recover for money had and received to his use*, for if, after a reasonable time has elapsed, the agent do not account to the principal, it may be presumed that he has received money for the goods;" *Hunter* v. *Welch*, 1 Stark. N. P. C. 224. This dictum, however, is very questionable. The proper and only mode of proceeding seems to be, by a special action against him for not accounting. ‡

A *del credere* commission (*b*) is one under which the agent, in consideration of an additional premium, engages to insure to his principal not only the solvency of the debtor, but the punctual discharge of the debt: (*c*) and he is liable in the first instance, without any previous demand from the debtor. (*d*)

As this commission makes the factor responsible, not only for the solvency of the purchaser, but for the absolute payment of the price to the seller, in the same manner as if he were himself the principal, it follows, that if he receive the price from the purchaser and remit it by bills to his principal, he is responsible for the payment of those bills, and is not discharged like a common factor, by the circumstance of the parties to the bills being in good credit at the time when he took them. M'Kenzie & Co. merchants in Scotland, sold corn for Scott, who resided in London, at three months' credit, and took the purchaser's bills at that date. But for the greater accommodation of Scott, they procured for those bills others drawn by a house in Edinburgh, upon a house in London, both in good credit at the time, at seventy-five days, payable to their own order, which they remitted to Scott indorsed, who got them accepted, credited M'Kenzie & Co.

(*b*) 6 Bro. P. C. 287. (*c*) Beawes, 429.

(*d*) *Grove* v. *Dubois*, 1 T. R. 112. ⊥ See post, where the inaccuracy of this position is pointed out. A *del credere* agent is merely a *surety* to his principal. ⊥

with the amount, settled accounts with them, and paid them a balance for an accidental overpayment. M'Kenzie & Co. in calculating the amount of the bills, had charged $2\frac{1}{2}$ per cent. for common commission, besides $1\frac{1}{2}$ per cent for a *del credere* engagement. Upon the failure of the drawers and acceptors of the bills, M'Kenzie & Co. insisted that they were not liable to Scott, contending that their engagement only extended to the solvency of the purchaser, and the due payment by him; that the remittance was a new transaction, and that to make them liable at all events for the goodness of the bills remitted, required a distinct commission upon the remittance; and that the first commission being at an end by the payment of the purchaser in good bills, they were, as to the remittance, in the condition of common factors, and consequently discharged by having proceeded in the usual course of trade, and remitted by bills which were in unquestionable credit at the time. But the Court of Session in Scotland, and afterwards the House of Lords, decreed, that they were liable: considering, as it seems, that nothing short of the same payment which would discharge the purchaser, is sufficient to absolve a factor under a *del credere* commission.(e)

(e) *M'Kenzie* v. *Scott*, 6 Bro. P. C. 280, Tomlin's ed. ‡ The decision is clearly right, but it arises at once out of the contract of *guaranty* entered into by the agents, the guaranty being that the principal shall be *paid*, not that he shall receive good bills. See

⸸ A broker, though not acting under a *del credere*, may by his mode of dealing render himself liable directly to his principal for the amount of goods sold. Thus where the broker in his own name drew on the purchaser in favour of his principal a bill, which he transmitted to his principal, he was held liable to him as the drawer, the Court remarking, that the broker by giving the bill put an end to all doubt as to the buyer's responsibility, and that the vendors on receiving it dismissed from their minds all care about the solvency of the purchaser. (2) And again, where the factor gave his own promissory note to the principal for the amount of a sale, and did not disclose the name of the purchaser until it was ascertained that the purchaser was insolvent, it was held, that he could not recover back from his principal the money which he (the factor) had been compelled to pay to an indorsee of the note. (3) ⸸

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post, as to the nature of a *del credere* agency. Substantially the same point was determined in *Lucas* v. *Groning*, 7 Taunt. 164. ⸸

(2) ⸸ *Le Fevre* v. *Lloyd*, 5 Taunt. 749; and see *Goupy* v. *Harden*, 7 Taunt. 159. ⸸

(3) ⸸ *Simpson* v. *Swan*, 3 Camp. 291. "If," says Lord Ellenborough in this case, "the principal draws before the sale, it is very reasonable that he should repay the money when the consideration fails on which the factor granted the acceptance. There the principal is deprived of no information, and is led into no error. But where after the sale, the factor, without mentioning to whom he has sold, or what security he has taken, remits a bill of exchange or promissory note for the net proceeds, this naturally seems to close the transaction, and completely lulls the suspicion of the principal." ⸸

3. Though agents be not, except in the cases already recited, answerable for payments before they have been made to them, the actual receipt of money, on account of their principal, makes them in all cases accountable, and if called upon to transfer their principal's property by virtue of an authority given to a third person, it behoves them to examine the validity of such authority, for if that be forged, it will not protect any payments made under it.(*f*)

(*f*) *Forster* v. *Clements*, 2 Campb. 17. (And see *Smith* v. *Mercer*, 1 Marsh. 453; 6 Taunt. 56, S. C.; *Rogers* v. *Kelly*, 2 Camp. 123.)

‡ In the case of *Wilkinson* v. *Johnson*, 3 B. & C. 428, the Court of King's Bench threw some doubt on the decision of *Smith* v. *Mercer*, or rather on the reasoning upon which it is founded—at all events, they were disinclined to press it further. *Smith* v. *Mercer* was a case where a bill with a forged acceptance had been paid by the banker of the supposed acceptor, and the Court of Common Pleas decided, that the money so paid could not be recovered back by the banker. *Wilkinson* v. *Johnson* was a case where money had been paid to take up a bill on the faith of a forged *indorsement*, by the bankers of the indorsee, and for his honour. And the Court of King's Bench allowed the bankers to recover back the money as paid under mistake. There does not seem, notwithstanding the ingenuity of Chief Justice Abbott, to be much distinction between the two cases in respect of the duty of the respective bankers, but they are sufficiently distinguishable by this—that in the former case a week elapsed before the discovery took place; in the latter, notice of the mistake was given to the person to whom the money had been paid on the same day. And it is a general rule now sufficiently established, that to entitle the agent by whom the money has been paid to recover it back, notice must be given on the very day on which the payment is made. See *Cocks* v. *Masterman*, 9 B. & C. 902; Danson & Lloyd, 329. ‡

4. But losses occasioned by the fraud or failure of third persons, to whom an agent has given credit pursuant to the regular and accustomed practice of trade, are not chargeable upon him: as the following instances exemplify.

A banker who had received bills of exchange from his correspondent to procure payment, instead of receiving payment in money, took the acceptor's check, and delivered up the bills. The check was dishonoured; but as it appeared that the banker had only pursued the usual course of business, Lord Kenyon declared himself clearly of opinion that he was not answerable for the event.(g)

The receiver of Lord Plymouth's estate took bills in the country, of persons who at the time were reputed to be of credit and substance, in order to return the rents in London. The bills were dishonoured, and the money lost; and yet the steward was held to be excused.(h) This was mentioned by Lord Hardwicke, in support of his opinion, that if a a trustee appoint rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. And none of these cases, his Lordship observed, are on account of necessity, but

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(g) *Russell v. Hankey*, 6 T. R. 12.
(h) *Knight v. Lord Plymouth*, 3 Atk. 480.

because the persons acted in the usual method of business. (*i*) (4)

In an action for money had and received, the facts were, that the plaintiff had engaged the defendant, as his agent, to receive money due to him from his customers, directing him to remit by the post a bill for these and other sums due to him. A bill was accordingly remitted to him by the post; but the letter was suppressed, and the money upon the bill received at the banker's by some unknown person, and was not recovered. Lord Kenyon said, had no directions been given about the mode of remittance, still, this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money received as agent. It was so determined in Chancery forty years ago. (*k*)

However, it may be collected from a case recently decided in Chancery, that if an agent place his principal's money to his own account with his general banker, without any mark by

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(*i*) *Ex parte Parsons*, Ambl. 219; and see 1 Br. Ch. R. 452; 3 Ves. Jun. 566; 6 Ves. Jun. 226, 266; 5 Ves. Jun. 331, 839.

(4) [The rule here laid down corresponds with that of the Civil Law, which is thus stated in the Digest: "*Si res pupillaris incursu latronum pereat, vel argentarius cui tutor pecuniam dedit, cum fuisset celeberrimus, solidum reddere non possit: nihil eo nomine tutor præstare cogitur.*" Dig. lib. xxvi. tit. 7, s. 50.]

(*k*) *Warwick* v. *Noakes*, Peake, N. P. C. 68.

which it may be specified as belonging to the trust, and the banker fail, the agent will not be excused; because he cannot so deal with his principal's money as that, if the banker's solvency continue, he may be in a condition to treat it as his own, and, if insolvency happen, he may escape by considering it as belonging to his principal. (*l*)

And a loss occasioned by an unauthorised disposal or adventure of the principal's money, and not prescribed by the usage of business, though intended for his benefit, is chargeable to the agent. (*m*)

SECTION 9.

It is one of the chief duties, and is implied in the contract of an agent, to keep a clear account, and communicate the results of it from time to time; and, when called upon, to account without suppression, concealment, or overcharge. (*a*) It has been laid down as a rule in the Court of Chancery, not to be departed from but upon very special circumstances, that an agent is bound to keep regular accounts of his transactions on behalf

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(*l*) *Wren* v. *Kirton*, 11 Ves. Jun. 382; † and see *Massey* v. *Banner*, ante, p. 10, (2); *Fletcher* v. *Walker*, 3 Mad. 73. †

(*m*) Ante, Ch. I. Part I. Sec. 2.

(*a*) *Lord Chedworth* v. *Edwards*, 8 Ves. Jun. 49; *Lord Hardwicke* v. *Vernon*, 14 Ves. 510; † *Topham* v. *Braddick*, 1 Taunt. 572. †

of his employers; not only upon his own part, accounts of payments, but also on the part of his employers, accounts of his receipts.(*b*) And an account has been decreed after a lapse of more than twenty years.(*c*) (1) Where an agent had for many years neglected to keep accounts, and had withheld part of his principal's money, an injunction was granted to restrain the transfer of the whole of certain stock, discovered to have been invested in his own name, till he should distinguish upon oath how much of it was bought with the money of his principal. (*d*) And this principle will be found to be established, by many authorities, as a settled rule of equity, that if an agent, whose duty it is to keep the property of his employer separate, mix it with his own, it lies upon him to distinguish them, and if he cannot distinguish what is his own, the whole is to be considered as belonging to the other.(2)

(*b*) *White* v. *Lady Lincoln*, 8 Ves. 369; (*Morgan* v. *Lewes*, 4 Dow's Rep. 52.)

(*c*) *Lady Ormond* v. *Hutchinson*, 13 Ves. 47, 53.

(1) [Where a reasonable time has elapsed, and the circumstances do not repel the presumption, a jury may presume that the principal has demanded an account, and that the agent has accounted. In *Topham* v. *Braddick*, supra, the space of fourteen years was considered as affording sufficient ground for an inference that an account had been rendered, and payment made of the sum due on the footing of the account.]

(*d*) *Lord Chedworth* v. *Edwards*, 8 Ves. 48; *Lupton* v. *White*, *Panton* v. *Panton*, 15 Ves. 436.

(2) ‡ See *Wren* v. *Kirton*, *Fletcher* v. *Walker*, and *Massey* v. *Banner*, ante, p. 10 (2). ‡

An inferior agent, however, is only accountable to his immediate employer, and not to the principal.(e)

2. The principal is in general entitled, not only to the bare amount of what has been received by his agent, but also (except waived by express or implied consent) to all the increase which has been made from his property.(f) (3). Therefore agents are liable for interest, if any have been actually made, upon a balance in their hands; or if they mix it with their own, and make use of it, unless the nature of the employment implies the consent of the principal to the enjoyment of this

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(e) *Cartwright* v. *Hately*, 1 Ves. Jun. 292: ‡ *Pinto* v. *Santos*, 5 Taunt. 447. That was a case where money had been paid into a bank by an agent, who was charged with the receipt of certain sums, to be afterwards distributed in certain proportions, and it was held, that the banker, though aware of the nature of the interest, was, after a portion of the money had been drawn out, accountable to the agent only by whom the disposal had been made, and not to any of the individual proprietors of the fund. See also *Schmaling* v. *Tomlinson*, 6 Taunt. 147. ‡

(f) *Brown* v. *Litton*, P. Wms. 141.

It is the practice of the Court of Chancery to make receivers pay interest upon balances in their hands if they do not pass their accounts regularly. ——— v. *Jolland*, 8 Ves. 72.

(3) [A usage authorising an agent to make a profit by a bill upon his principal, being a usage of "fraud and plunder," cannot be supported. Thus, where the master of a ship in a foreign port, from the state of the exchange, received a premium for a bill drawn upon England on account of the ship, this premium was held to belong to the owner, notwithstanding any usage which there might have been for masters of ships to appropriate such premiums to their own use. *Diplock* v. *Blackburn*, 3 Campb. 43.]

benefit by the agent.(*g*). It was held, indeed, in one instance, by Lord Thurlow, that an agent was not liable for interest upon money retained in his hands, though he had employed it at interest. But that case, resting upon very particular circumstances, is by no means inconsistent with the general rule; for the agent had regularly and duly informed his employer of the money in his possession, and had, at his desire, kept a large balance always by him.(*h*) So after a great lapse of time, and the accumulation known to the principal, interest has been denied.(*i*) And no interest is due upon money which has lain dead in the hands of an agent.(*k*)

(*g*) *Rogers* v. *Boehm*, 2 Esp. Cas. 704, per Lord Kenyon.

(*h*) *Lord Chedworth* v. *Edwards*, 8 Ves. 48.

(*i*) *Beaumont* v. *Boultbee*, 11 Ves. 360, but allowed from the time of filing the bills.

(*k*) *Rogers* v. *Boehm*, 2 Esp. Cas. 704, per Lord Kenyon. ⸸ There are some agents who are bound to invest the money which may come into their hands, and who are consequently liable for interest, whether it have been actually made or not. Such are trustees, receivers, &c. See 6 Mad. 155; 4 Dow, 209; 1 Ball & B. 219, 385: 3 Bro. C. C. 107. A fortiori, therefore, where there has been fraud or misconduct, or such dealing with the fund as that a profit has been derived from it to the holder. See 12 Ves. 402; 1 M'Clel. & Y. 427; 1 Russ. 146, 301. As to others, as stewards, &c. the question, whether interest is payable or not, will depend on the nature and course of their employment, and the mode in which they have been accustomed to account. And where the agent is a mere stake-holder, that is to say, liable at any moment to be called upon for payment, by whatever party, shall be found to be entitled, as is the case with

If no account have been kept, and money which can be ascertained to belong to the principal have been laid out in a specific property, it seems that the agent will be deemed in equity a trustee for the principal as to that property.(*l*)

3. And not only interest, but every other sort of profit or advantage clandestinely derived by an agent, from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. So that if an agent, who has purchased goods according to order, sell them again to advantage, with a view of appropriating the gain to himself, although he should have answered the loss, if any,(*m*) yet his employer is entitled to the profits.(*n*) For such conduct is a fraud, from which no advantage can be derived to the person practising it.(*o*) It is said, however, to have been resolved, that a covenant by a factor *to account for goods, or the produce thereof*, does not prevent him from converting the stock of his principal to his own use, provided he answer it out of his own. But it is probable that this resolution

auctioneers receiving a deposit on sale of lands, &c. no interest whatever is chargeable, even though it may have been actually made. See *Harrington* v. *Hoggart*, 1 B. & A. 577, and the cases there cited. ┼

(*l*) Semb. per Lord Chancellor, 8 Ves. 49.

(*m*) Malyne, 154.

(*n*) Beawes, 43; *Massey* v. *Davies*, 2 Ves. Jun. 317.

(*o*) *Beaumont* v. *Boultbee*, 7 Ves. 608, 617; 5 Ves. 485, S. C. ┼ See note (*k*). ┼

turned upon the particular terms of the covenant, and the form of the breach alleged in support of the action to which the resolution applied. (p)

Notwithstanding an account stated and settled under hand and seal, and the balance received by the principal, and even a release, he may, by application to the Court of Chancery, be allowed to surcharge and falsify the account, upon an allegation of errors subsequently discovered. (q)

But specific errors must be pointed out, even where there is an express exception of errors; (r) unless it appear upon the face of it to be a defective account. (s) Independently of error, it requires very strong grounds to open settled accounts. (t) Fraud, however, is a sufficient ground. (t)

4. Joint factors are liable for each other's receipts; and it is no discharge of one of two joint factors, that the business was wholly transacted by the other with the knowledge of the princi-

(p) *Shepherd* v. *Maidstone*, 10 Mod. 144.

(q) 1 Eq. Ca. Ab. 12, cites 3 Chanc. Rep. 18; 7 Ves. 599; *Chambers* v. *Goulden*, 9 Ves. 266.

(r) *Taylor* v. *Haylin*, 2 Bro. C. C. 310; *Dawson* v. *Dawson*, 1 Atk. 1; 3 Bro. C. C. 266; *Lord Hardwicke* v. *Vernon*, 14 Ves. 510.

(s) *Matthews* v. *Wallwyn*, 4 Ves. 125.

(t) 5 Ves. 837; Ib. 485. ┼ And see *Earl Hardwicke* v. *Vernon*, 14 Ves. 504.* Where there has been fraud, there is generally no limitation of time for re-opening the account. ┼

pal.(*u*) And as a joint consignment makes each liable to account for the whole, so where two agents, though residing in different places, agree to share the profits of their respective commissions, they become liable by such agreement as joint agents to all persons with whom each may contract as agent, notwithstanding that their agreement between themselves provides that neither shall be liable for the acts or losses of the other, but each for his own.(*w*)

And a discharge of one joint factor is a release of the other.(*x*)

A surviving partner must account for himself and his deceased partner;(*y*) and upon the death of one of two joint principals, the remedy belongs to the survivor alone.(*z*)

‡ An agent when called upon to account cannot dispute the title of his principal. Thus an insurance broker who had effected a policy on a

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(*u*) *Godfrey* v. *Saunders*, 3 Wils. 73; *Goore* v. *Daubeny*, 2 Leon. 75, 76. And see Cowp. 814, *in notis*.

(*w*) *Waugh* v. *Carver*, 2 H. Bl. 235. ‡ But where upon a dissolution of partnership one of two joint consignees had assumed the disposition of the goods consigned, he was held liable for the proceeds of the sale in an action brought against him singly for *money had and received*. *Wells* v. *Ross*, 7 Taunt. 403. A joint action might have been maintained against *both* for not *accounting*. ‡

(*x*) Bro. tit. Charge, pl. 49; 3 Wils. 106; 2 Leon. 77, *arg*.

(*y*) Eq. Ca. Ab. 5; Ch. Ca. 127; Ch. Rep. 129.

(*z*) *Martin* v. *Crump*, 1 Lord Raymond, 340; 1 East, 366; 1 Ves. 242.

ship in the name of a partnership, and upon a loss happening had received the money in his character of broker, was held accountable for that money to the surviving partner, although the partnership had no legal title to the vessel, and although the broker himself was, as mortgagee, the sole registered owner.(4)†

(4) † *Dixon* v. *Hamond*, 2 B. & A. 310. And see *Roberts* v. *Ogilby*, 9 Price, 269, for another illustration of the same principle. †

PART II.

HAVING in the preceding part of this chapter treated of the obligations of agents towards their employers, I shall next inquire into the means of enforcing these obligations, or of obtaining redress for the neglect of them. These are—

First, Against agents personally to compel an account, or the payment of a balance, or to obtain satisfaction.

Secondly, To regain property withheld, or the produce, if improperly disposed of.

Thirdly, Against representatives in case of insolvency or death.

SECTION 1.

1. Where the transactions between the employer and agent involve mutual accounts, which must be examined before the certainty of the demand can be known, the action of account was formerly the usual remedy.(a) And it may be found laid down in many cases, that an action of

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(a) Eq. Ca. Ab. 5. For the proceedings in account against a factor, and the law thereon, see *Godfrey* v. *Saunders*, 3 Wils. 106.

debt or *indebitatus assumpsit* cannot properly be maintained under these circumstances.(1) A case is reported, in which it was ruled at Nisi Prius, that an *indebitatus assumpsit* lies not against a man where he has received money of the plaintiff to lay out to a particular use, and he has laid out part thereof accordingly; for then, it was

(1) [In the case of *Scott* v. *M'Intosh*, 2 Camph. 238, an opinion was intimated by Lord Ellenborough, that the action of account was the proper mode of investigating a running account between a merchant and a broker, and that [indebitatus] assumpsit would not lie. This question, however, was afterwards brought under the consideration of the Court of Common Pleas, in the case of *Tomkins* v. *Wiltshire*, 1 Marsh. 115: 5 Taunt. 431, S.C. And it was there decided, that if, upon dissecting an account, there appear money due upon certain items, assumpsit will lie, notwithstanding the items on each side may be numerous. And in that case Gibbs, C. J. observed, that "the foundation of an action of account is, that the party wants an account, and is not able to prove his items without it." See also the case of *Arnold* v. *Webb*, 5 Taunt. 432, note.]

[It will be seen on reference to the report of *Scott* v. *M'Intosh*, that it was a case which could not be *conveniently* tried by a jury, and the dictum of Lord Ellenborough was probably the result of irritation at the refusal of the parties to refer. It was the same inconvenience which gave rise to the question in the two other cases, for it could never for the last 100 years have been seriously maintained that indebitatus assumpsit would not lie where there were items in the account capable of being established by proof. But the difficulty of trying complicated questions of account at Nisi Prius has been long seriously felt and acknowledged; and during the last session, Lord Tenterden introduced a bill into Parliament for enabling the judge at Nisi Prius compulsorily to direct a reference in such cases, which, though for the present deferred, will no doubt ultimately be carried into a law.]

said, he ought to be called to account for the same by action of account; but if none were laid out, there an *indebitatus assumpsit* lies, to recover back the money again. So if it were expended to another purpose, for there the sum is certain and may be demanded as a debt.(*b*) In another case, the rule laid down by the Court is, "there the action of account is necessary, when the first receipt was directed to a merchandizing, which makes uncertainty of the neat remain, till account finished."(*c*) And a distinction is also met with between a delivery of money, &c. upon an express promise to account, and a delivery generally: in the former of which it is said *assumpsit* lies, but in the latter account only.(*d*) But on misapplication of money received for a particular service,(*e*) or on refusal to account, the debt is absolute, and debt or *indebitatus assumpsit* lies, and after verdict, these facts will be presumed.(*f*) And in all cases of money received for the principal, by an agent who has no way of discharging himself but by paying it over, debt or *indebitatus*

(*b*) *Hartup* v. *Hardlow*, 2 Sh. 301. And see *Poulter* v. *Cornwall*, 1 Salk. 9; Owen, 8[illegible].

(*c*) *Sparke* v. *Richards*, Hob. 206; *Anon.* 11 Mod. 92, per Holt, C. J.

(*d*) *Spurraway* v. *Rogers*, 12 Mod. 517, per Holt, C. J. And see *Wilkin* v. *Wilkin*, 1 Salk. 9.

(*e*) Per Powel, J. *Anon.* 11 Mod. 92; 12 Mod. 521.

(*f*) Id. ibid.

assumpsit lies, or account, at the election of the principal.(*g*)

† And the same remedy is available against a sub-agent, for although not responsible to the party really entitled as principal until he has had notice of the right, and has been required to account accordingly, yet if after such notice and requisition he pay over to his own immediate principal money which has come into his hands belonging to the party who has given the notice, he will be liable to pay it over again.(2) †

2. However, special actions of assumpsit, as for a breach of contract in not accounting upon the undertaking expressed (*h*) or implied in the contract, are sometimes brought. And this is a convenient remedy, if the matter be capable of determination without entering into the detail of mutual accounts at Nisi Prius. (*i*) "Though there be [are] authorities which deny that such an action lies without an express promise; (*i*) and even then, in one case, Lord C. J. Holt declared he would not let the plaintiff give all the account in evidence, or enter into the particulars thereof, but that he should direct his proof only as to the

(*g*) *Kea* v. *Gordon*, 12 Mod. 521; *Hammond* v. *Ward*, Sty. 287.

(2) † *Mann* v. *Forrester*, 4 Campb. 60. †

(*h*) *Wilkins* v. *Wilkins*, Carth. 89; 1 Salk. 9, S. C.

(*i*) 12 Mod. 517; *Wilkins* v. *Wilkins*, Carth. 89; Comb. 149, S. C.; 1 Salk. 9, S. C. (But see *Topham* v. *Braddick*, 1 Taunt. 572.) † There can be little doubt that the law will in all such cases infer a promise to account. †

damages he had sustained by not accounting according to the promise, for he would not travel into an account in such actions.(*k*) (3)

The action cannot properly be brought in this form, for money delivered for a special purpose, until there has been a failure in applying it; for if the purpose be countermanded before the money is applied, the remedy is by action for money had and received.(*l*) ⸸ And conversely the action for money had and received will not lie so long as the trust continues open, and nothing has been done to countermand or otherwise determine it.(4) ⸸

3. Where the accounts are intricate and difficult, a bill in equity is the more usual and suitable proceeding to compel an account;(*m*) being best calculated to do justice between the parties, since the plaintiff can thereby obtain a discovery of books and papers, and have the benefit of the defendant's oath; who, on the other hand, is

(*k*) Carth. 89.

(*l*) Post.

(3) ⸸ See ante, note (1). ⸸

(4) ⸸ *Case* v. *Roberts*, Holt's N. P. C. 500. ⸸

(*m*) Eq. Ca. Ab. 5; ⸸ *Mackenzie* v. *Johnston*, 4 Mad. 373. But the bare relation of principal and agent is not sufficient to entitle the former to relief in equity, if the matter can be fairly tried at law. *Spencer* v. *Spencer*, 2 Y. & J. 249. And therefore a bill filed for an account, and an injunction, must disclose a case of open and ansettled items, and not such merely as would form a ground of set-off to an action at law; otherwise the bill will be demurrable. *Frietas* v. *Dios Santos*, 1 Y. & J. 575; *Cooper* v. *Hatton*, 12 Price, 502. ⸸

entitled to all, both legal and equitable, allowances; and if, by his answer, he charge himself, the same is also a discharge, if there be no other evidence.(n) And this is also the proper mode of compelling agents to account for profits improperly or clandestinely made by breach of their trust.(o)

And in many cases where the principal has a remedy at law, as where an agent has been entrusted with money to lay out in a particular manner, the principal may either recover it on default of such application, or may compel the specific application by the aid of a court of equity.(p)

4. Wherever the demand does not depend upon a settlement of open accounts,(q) as where the accounts are closed and a balance agreed,(r) an action of debt or assumpsit for money had and received, or on an account stated, or if against a *del credere* agent, an action of assumpsit upon the special undertaking is the proper remedy. And a balance struck with a promise to pay it, has been held sufficient to maintain an assumpsit, notwithstanding a covenant to account.(s)

(n) Eq. Ca. Ab. 10; but see *Thompson* v. *Lambe*, 7 Ves. 588, the qualification of this rule.

(o) 4 Ves. Jun. 411, 13 id. 47 ante.

(p) *Scott* v. *Surman*, Willes, 404.

(q) Hob. 206; 2 Sh. 308.

(r) *Egles* v. *Vale*, Cro. Jac. 69; Yelv. 70.

(s) *Foster* v. *Alanson*, 2 T. R. 479.

5. Likewise if an agent receive money, either from his employer for a special purpose, or from a third person to pay over to his employer, and neglect or refuse so to apply it, it may be recovered by the same form of action.(*t*) "It is," according to Lord Chief Justice Willes, "a general rule, that if a man receive money which ought to be paid to another, or to apply to a particular purpose, to which he does not apply it, the action of assumpsit will lie as for money had and received; and though a bill in equity may be proper in several of these cases, yet an action at law will lie likewise. As if I pay money to another to lay out in the purchase of a particular estate, or any other thing, I may either file a bill against him, considering him as a trustee, and praying that he may lay out the money in that specific thing, or I may bring an action against him as for so much money had and received for my use.(5) Courts of equity always retain such bills when they are brought under a notion of a trust, and therefore have often given relief where the party might have had his remedy at law, if he had thought proper to proceed that way."(*u*)

This is also a proper form of action where money has been deposited for a particular pur-

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(*t*) *Lincoln* v. *Topliff*, Cro. Eliz. 644.

(5) ┼ But see *Case* v. *Roberts*, ante. ┼

(*u*) *Scott* v. *Surman*, Willes, 404.

pose, whether that purpose be legal or illegal, if it have been countermanded before application. (v)

6. Under any of these circumstances, therefore, the debt is proveable under a commission of bankruptcy, and is barred by certificate. (w)

7. The debt to be recovered by any of the means last stated, is the balance only of sums received after deducting all just allowances, though not pleaded by way of set-off, (x) together with interest, if any have been made. (y)

8. If money have been actually paid to an agent for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands. For though the law would not have assisted the principal, by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet when that contract is at an end, the agent, whose liability arises solely from the fact of having received money for another's use, can have no pretence to retain it. This doctrine was recognised by the Court of Common Pleas in a case where a broker, having effected an insurance upon a ship engaged in a trade to the East Indies, contrary to the

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(v) *Taylor* v. *Lendie*, 9 East, 49.
(w) *Wright* v. *Hunter*, 1 East, 20; 2 Ves. 792.
(x) *Dale* v. *Sollett*, 4 Burr. 2135.
(y) *Rogers* v. *Boehm*, 2 Esp. Cas. 704.

7 Geo. I. st. 1, c. 21, s. 2, and having received the loss from the underwriters, refused to pay it over to his employer, alleging the illegality of the transaction as a defence to the action for money had and received to his use. The plaintiff, however, had a verdict; and the Court, upon a motion for a new trial, thought the verdict right.(z) And in a subsequent case, where the defendants had received money for the plaintiff, as the price of counterfeit coin, which they had been employed to carry and procure payment for from the parties who purchased it, it was held, that the illegality of the transaction furnished no defence to them in an action for money had and received. And, in both these cases, the Court considered the original transaction as forming no part of that implied contract arising from the receipt of the money, which formed the ground of the action.(a)

The same rule has also been laid down in courts of equity.(b) And there is no difference in this

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(z) *Tenant* v. *Elliott*, 1 B. & P. 3.

(a) *Farmer* v. *Russell*, 7 Ves. 473; 1 B. & P. 296.

(b) 7 Ves. 473. Post.

The authority of these cases may seem to be opposed by one, which, though of older date, does not appear to have been adverted to in the consideration of them. The plaintiff was an underwriter, and the defendant a broker. The plaintiff had paid a loss upon a ship-policy underwritten by him; but another person, who had agreed to take half the plaintiff's risk, had paid his moiety of the loss into the defendant's hands, from whom the plaintiff sought to recover it as money received for his use; but Lord Kenyon was of opinion, that this was an illegal partner-

respect between a transaction that is *malum prohibitum*, and one that is *malum in se*.(c)

But if the demand of the principal cannot be brought before the Court, but through the medium of the illegal contract itself, he cannot enforce it. Thus where money had been deposited with a stock-broker to lay out in illegal stock-jobbing adventures, and upon a settlement of accounts, the broker gave bills for a sum, part of which was for the profits of these transactions, the Lord Chancellor, upon a review of all the cases upon the subject, would not allow the principal to prove under the broker's commission for that part of the

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ship, and that the plaintiff could not recover, considering the action as brought to enforce an illegal contract. It does not, however, appear, that the question in that case was taken up on any other grounds than as a question of the plaintiff's right to recover against the other partner. It is consistent, therefore, with the circumstances stated in the report, that the broker had received notice to retain it, which, it is admitted in the cases referred to, would have prevented the plaintiff's recovery. *Sullivan* v. *Greaves*, Park. Inst. 8; 6 T. R. 409. ⍿ This case is not considered to be law. ⍿

(c) *Farmer* v. *Russell*, 1 B. & P. 296, per Eyre, C. J.; *Aubert* v. *Maize*, 2 B. & P. 371; ⍿ *Cannan* v. *Bryce*, 3 B. & A. 179; *Bensley* v. *Bignold*, 5 B. & A. 335; *Ex parte Daniel*, 14 Ves. 192. The absurd distinction between *mala prohibita* and *mala in se* was certainly considered to have been exploded by the good sense of the Courts and the authorities above referred to. It is, therefore, matter of regret that the Court of King's Bench seems, in a recent case, to have again admitted the distinction in favour of the right of a plaintiff to recover. *Browne* v. *Duncan*, 10 B. & C. 93; Lloyd & Welsby's Merc. Cas. 91; and see the note to the latter report. ⍿

amount of his debt which was made up of those profits.(*d*) And in an action for money had and received for the plaintiff's use, the facts were, that the plaintiff had employed the defendant as his agent, to buy certain shares in the British ale brewery, for which the defendant had charged and received from the plaintiff at the rate of 10 per cent. *premium*, whereas the market price was 5 *per cent.*, and the action was brought for the surplus. But the British Ale Company appearing to be an illegal undertaking under 6 Geo. I. c. 18, s. 18, 19, (by which also the purchase of shares in such undertaking is made an offence,) the plaintiff was nonsuited, upon the ground that no action could arise from a transaction in itself illegal.(*e*)

If the agent have not actually received the money, but have debited himself with the amount in his account with the party, who is to pay it to his employer, that will not enable the latter to support an action for it, as money received to his use. (*f*) (6)

(*d*) *Ex parte Bulmer*, 13 Ves. 313.

(*e*) *Buck* v. *Buck*, 1 Campb. 547, cor. Sir J. Mansfield, C. J. of C. P.

(*f*) *Edgar* v. *Fowler*, 3 East, 222.

(6) ┼ The proposition in the text is not warranted by the judgment of the Court in *Edgar* v. *Fowler*, unless it is to be understood as applying solely to an illegal transaction. The words of Lord Ellenborough are these: " the money does not appear to have been actually *paid* into the defendant's hands. *In cases of*

9. As long as money deposited with an agent, for an illegal purpose, remains unemployed, or if the purpose be countermanded by the principal before application, it is a debt which may be recovered at law(*g*) or in equity.(*h*)

And it was once held, that even where money, deposited for an unlawful object, had been applied by the agent towards that object, the principal might, nevertheless, make him answerable for it.(*i*) But the contrary appears since to have been taken for granted by Lord Mansfield. For in an action tried by him at Guildhall, to recover back from the defendant a sum paid to him for the purpose of being given to a creditor, to sign a bankrupt's certificate, and it appearing that the money had actually been so paid over, his lordship was clearly of opinion, that the action would not lie against the party's own agent, who had actually applied the money to the purpose for which it was paid to him.(*k*) (7)

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illegal transactions it may always be stopped whilst it is in transitu *to the person who is entitled to receive it.* If indeed this had been a legal transaction, the money might, perhaps, have been considered as paid." That in ordinary cases, an agent who has taken credit in account is estopped to say, as against his principal, that he has not received the money, is expressly decided in the case of *Andrew* v. *Robinson*, supra, p. 38. †

(*g*) *Taylor* v. *Lendie*, 9 East, 49.

(*h*) 13 Ves. 313.

(*i*) *Wilkinson* v. *Kitchen*, 1 Lord Raym. 89.

(*k*) *Smith* v. *Bromley*, Doug. 696, *in notis.* In the case of *Tomkins* v. *Barnet*, 1 Salk. 22, it is said the following case was cited:—One was employed as a solicitor, and had money given

10. When there is a covenant, or bond conditioned to account, assumpsit does not lie(*l*) before an account taken or a balance agreed to,(*m*) but the remedy is upon the deed.

The duty required from a factor, or agent, may be contracted by the covenant to a narrower compass than that which the employment itself would prescribe;(8) for though a factor, generally speaking, cannot trade with his principal's goods on his own account, yet, in an action on a bond conditioned, 1st, to perform all covenants in a certain indenture, one of which was to serve the obligees as factor at Fort St. George; 2d, to ac-

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him to bribe the custom-house officers, and he laid out the money accordingly; assumpsit was brought against the solicitor for the money, and held, it lay not. Though the case of *Tomkins* v. *Barnet* is treated by Lord Mansfield in *Smith* v. *Bromley*, as of no authority, yet he recognises the case here mentioned as law.

(7) ┼ The law is somewhat different as regards a mere stakeholder. For it has been settled by many cases, that where money has been deposited in the hands of a third person, to abide the event of some illegal transaction, either of the parties may at any time insist on taking back his portion of the stakes; and though the event have been determined, and the stakeholder have paid the money over to the winner, still if the loser, even after the decision, but before the payment over, had expressed his dissent, the stakeholder will be bound to pay him his moiety of the stakes. *Hastelow* v. *Jackson*, 8 B. & C. 222, where all the cases on this subject are reviewed.┼

(*l*) *Bulstrode* v. *Gilburn*, 2 Str. 1027.

(*m*) *Foster* v. *Alanson*, 2 T. R. 479.

(8) ┼ Conventio vincit legem.┼

count, upon request, with the East India Company, for whatever of their goods should come to his hands, *or the net produce of them;* and the breach assigned was, that he unlawfully embezzled and took certain specified articles to his own use: it was held, that this was no breach of the condition; the reason given for which was, that the defendant, being to account not for the goods themselves, but for the net produce, might convert to his own use the stock, provided he answered it out of his own.(*n*)

In assigning a breach of a condition of this kind, care must be taken to bring it within the terms *recited* in the condition, though the obligatory part thereof may be general. Thus, the condition of a bond recited, that the defendant was receiver at Bristol to the plaintiffs: "if, therefore, he do well and truly account for all sums by him received, then the bond to be void." The breach assigned was, that he received so much, and did not account for it; and because it appeared by the recital to be only about transactions of a particular nature, the general assignment of the breach was held ill.(*o*) So, likewise, if it recite an intended service for a particular time, though the condition be general, the obligor will not be liable on the *covenant* beyond that

(*n*) *Shepherd* v. *Maidstone*, 10 Mod. 144.

(*o*) *African Comp.* v. *Mason*, 1 Str. 227. See 1 Saund. 411; 6 East, 509.

time,(*p*) though he will still be liable for money had and received.

If the account involve a multiplicity of items, which could not be detailed in pleading, without inconvenient prolixity, it is not necessary, in an action upon a bond for a breach of the condition to account, to enumerate each sum of money received; but to a plea of general performance it is sufficient to reply, that the defendant has received so much, for which he has not accounted.(*q*)

Though the condition be only to render an account, a breach that the obligee neglected to pay what was found due, is well assigned.

If the condition be to pay over the balance at a place to be appointed, and the defence is, that no place has been appointed; the defendant must plead that fact specially in the first instance, for,

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(*p*) *Liverpool W. W. Comp.* v. *Atkinson*, 6 East, 509.

(*q*) *Shum* v. *Farringdon*, 1 B. & P. 643; *Barton* v. *Webb*, 8 T. R. 459, contrà, *Jones* v. *Williams*, Doug. 214; 10 Mod. 144; but see S. C. 1 Str. 227.

† In *Gale* v. *Reed*, 8 East, 85, Lord Ellenborough expressly stated, that the case of *Jones* v. *Williams* was overruled. The principle is, that where the particulars lie more in the knowledge of the defendant than of the plaintiff, a general averment is sufficient. See also *Wilcock* v. *Nicholls*, 1 Price, 109, and *Calvert* v. *Gordon*, 7 B. & C. 807. It appears, however, from the case of *Serra* v. *Wright*, 6 Taunt. 45, that the Court of Common Pleas considered a breach ill-assigned which stated merely that the defendant had not accounted, without averring that he had received monies, although the breach was in the terms of the covenant. †

if pleaded by way of rejoinder, after a plea of payment and replication, alleging non-payment at the place appointed, it is a departure.(r)

(r) *Sams* v. *Dangerfield*, 2 Mod. 31.

It is usual for bankers and others, who are obliged to entrust the receipts of money to agents or clerks, to provide for their indemnity, by the bond of a third person, conditioned for the fidelity of the agent. Upon the subject of these securities, it may be useful to notice the following points: 1. However general the condition, it is restrained, both as to duration and object, by the recital. Bond with condition, reciting that whereas H. A. had deputed T. J. to execute the office of deputy postmaster for the county of O. from the 24th of June, for six months following, to be void if the said T. J. should well and faithfully perform the duties, &c. *during all the time* he should continue deputy postmaster. It was held, notwithstanding the generality of the words *during all the time*, that the surety was not liable longer than the time specified in the recital. *Lord Arlington* v. *Merrick*, 2 Saund. 411; *Liverpool W. W. Company* v. *Atkinson*, 6 East, 509, S. P.; *African Company* v. *Mason*, 1 Str. 227.

[*Pearsall* v. *Somersett*, 4 Taunt. 593. So the obligation is restrained, both as to duration and object, if it appear on the pleadings that the appointment is only for a limited time. *Saint Saviour's, Southwark*, v. *Bostock*, 2 N. R. 175; *Hassell* v. *Long*, 2 Maule & Selw. 363. ‡ Or if it appear by *Act of Parliament* that the office is annual, or otherwise limited, because then it is unnecessary to state it on the record. *Peppin* v. *Cooper*, 2 B. & A. 431.‡ But where the Act of Parliament, by which the office was created, did not expressly limit its duration, and the obligation was indefinite in its language, relating to a period both prospective and retrospective, the surety was held liable during the whole time that the officer might continue in office. *Curling* v. *Chalklin*, 3 Maule & Selw. 502.]

‡ See also *Leadley* v. *Evans*, 2 Bingh. 32, where the decision is somewhat at variance with this last case, though founded on the same general principles, and *Saunders* v. *Taylor*, 9 B. & C. 35.

A bond conditioned for the fidelity of a clerk, was put in suit

SECTION 2.

1. For misconduct, neglect, or disobedience of instructions by an agent, the remedy is, either by

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against the *executor* of the obligee. The breaches were after the death of the testator, and after a notice given by the executor that he would no longer be liable. But the Court held, that the executor could not *at once* get rid of his liability by a notice, and that if hardship resulted from the obligation, the parties should take care to express in the condition of the bond, that the liability should be at an end in a specified time after due notice given. *Calvert* v. *Gordon*, Dan. & Lloyd's Merc. Cases, 173. An injunction which had been previously obtained by the executor to restrain an action on the bond was dissolved on the merits. 2 Sim. 253; and see 4 Russ. 581.+

2. Where the obligation is, that the agent shall account for and pay to the obligee, his executors, &c. the surety is not liable for neglect of accounting in the employment of the executors, though the same business be continued by them, and the agent remain in the same employment. *Barker* v. *Parker*, 1 T. R. 287.

3. If the business, to which the employment relates, be carried on by the obligee or obligees alone, at the date of the bond, the obligation ceases upon the introduction of another partner. *Wright* v. *Russell*, 2 Bl. Rep. 934; 3 Wils. 530; and the principle of these cases has been recognized in *Strange* v. *Lee*, 3 East, 490. But where the condition recited, that the plaintiffs intended to take P. S. into *their* service, as a clerk in their shop and counting-house, it was held, that the surety was not discharged by the introduction of a new partner; the Court particularly resting upon this being a security to the house, and not to the individuals. *Barclay* v. *Lucas*, 1 T. R. 291. In the case, however, of *Strange* v. *Lee*, 3 East, 490, Lord Ellenborough intimated a doubt of the soundness of this decision, and observed, that expressions occur there which it is difficult to reconcile with the other authorities. And it may be remarked, that the case of *Wright* v. *Russell*, to which Mr. J. Willes there

action on the case as for a wrong, or of assumpsit on the implied undertaking. In one or other

denies his assent, has been acted upon since, viz. in *Myers* v. *Edge*, 7 T. R. 255. It is suggested by Mr. J. Lawrence, 3 East, 491, that the condition might be taken to be answerable not only to the present, but to all future partners. It seems, that the same effect follows from the secession of one of the former partners, as from the introduction of a new one. *Myers* v. *Edge*, 7 T. R. 255.

[So a bond, conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, was held not to extend to sums advanced, after the decease of one of the five, by the four survivors then acting as bankers. *Weston* v. *Barton*, 4 Taunt. 673. And where a bond was given to the governors of a voluntary society, conditioned to secure from their collector a faithful account of all monies received by him, and the society was afterwards incorporated, the obligors in the bond were considered not liable for monies collected after the incorporation, and misapplied by the collector, on the ground, that after the charter of incorporation the society constituted a perfectly new body of persons in the judgment of the law. *Dance* v. *Girdler*, 1 N. R. 34. On the other hand, where a bond was given to certain persons, as *trustees*, on the behalf of a successive or fluctuating body of persons, the obligation was held to remain in force, notwithstanding a change in the company, the Court construing it as an indemnity to the company for the time being. *Metcalf* v. *Bruin*, 12 East, 400.] ┼ And see *Leadley* v. *Evans*, and *Saunders* v. *Taylor*, supra; *Pease* v. *Hirst*, 10 B. & C. 122; Lloyd & Welsby's Mer. Cas. 81. A suretyship for a particular individual does not extend to dealing by the obligee with that individual as one of a partnership subsequently formed, *Bellairs* v. *Ebsworth*, 3 Campb. 52. And conversely, a suretyship for a firm is at an end on the death or retirement of any of the partners of that firm. *Simson* v. *Cooke*, 1 Bing. 452. ┼

4. A condition to account is a condition to pay what shall be found due. Condition that A. should render a true account in

of these actions, the principal may recover compensation in damages for the injury suffered.(1) To support these actions it is necessary to prove,

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writing; the breach assigned was, that upon the last account in writing £—— was due from A., which, upon demand, he refused to pay; and, upon demurrer, the breach was held well assigned. *Bach* v. *Proctor*, Doug. 367.

5. Such a guarantee is not waived by the obligee not having given immediate notice to the surety of the agent's misconduct; nor even by giving the agent credit for the sums embezzled, as for a loan. *Peel* v. *Tatlock*, 1 B. & P. 419. [*Nares* v. *Rowles*, 14 East, 510; *The Trent Navigation Company* v. *Harley*, 10 East, 34;] ⊥ *Lincoln Assurance Company* v. *Buckle*, 4 B. Moore, 153; *Goring* v. *Edmond*, 3 M. & P. 259.⊥

But where the obligee, on becoming surety for the fidelity of an apprentice, took a covenant from the master that he should, at least once a month, see the apprentice make up his cash, it was held by the Lord Chancellor, on a bill filed by the obligor for relief against an action on the bond, that the covenant was not only to see to the right casting of the cash, but to see it effectually made up; and that the obligor was liable for no more than the apprentice had embezzled in the first month. *Montague* v. *Tedcombe*, 2 Ven. 518; 1 Eq. Ca. Ab. 308.

6. If the condition be to repay whatever the agent shall purloin and embezzle *to his employer's damage*, a breach that he purloined and embezzled so much is good, without averring it to be to the damage of the employer; for the words "purloin and embezzle" are always taken in a bad sense, and *ex vi termini* import the damage of the master. *Thornicroft* v. *Barnes*, 10 Mod. 149.

(1) ⊥ A bill of discovery will lie in aid of an action by the principal against his agent for misconduct; and a London broker cannot protect himself from answering such bill on the ground that such discovery will subject him to a forfeiture of the penalty of his bond to the corporation of London. *Green* v. *Weaver*, 1 Sim. 404. ⊥

1st. Actual damage; (2) 2d. Negligence or default in the agent. As to the first, the loss of a sup-

(2) ‡ Proof of actual damage is not essential to the maintaining of the action. Not to the action of assumpsit, because if there be a contract, and that contract has been broken by the agent, he is at once liable to an action, although the damages will be merely nominal, if no injury has been sustained in fact. Not to the action on the case as for a wrong, because wherever there is a right on one side and a duty on the other, founded on a sufficient consideration, the law implies a contract between the parties, and therefore the action on the case for such a breach of duty is always convertible into an action of assumpsit founded on the implied contract, wherein the defaulter is, as we have said, always liable for his default, though no damage be shown to have resulted. An endeavour, indeed, has recently been made to introduce a distinction in this respect between an *express* and an *implied* contract. In the former it was admitted that actual damage was not essential to the action; but it was contended that the latter, which was a creation of the law, would not arise unless some injury had resulted from the breach of it. The Court, however, very properly rejected this distinction, alleging that the only difference between an express and an implied engagement was, that the former was established by direct proof —the latter was inferred from circumstances; and that when once the contract was established, in whatever manner, the same consequences must attach. *Marzetti* v. *Williams and others*, 1 B. & Ad. 415. This case is further important as illustrating the general liability of one species of mercantile agent, that, namely, of a banker to his customer, and it may be well, therefore, to give an abstract of it here. The plaintiff was a merchant in the city of London. The defendants were bankers also in London, with whom the plaintiff kept an account. On the evening of the 17th Dec. 1828, the balance in favour of the plaintiff was 69*l.* 19*s.* 6*d.* About eleven the following morning a further sum of 40*l.* was paid in to his account. About three o'clock in the afternoon of that same day a check, drawn by the plaintiff for 87*l.* 7*s.* 6*d.*, was presented for payment, which the clerk to whom it was presented,

posed or probable advantage is not sufficient; and therefore, in an action against an agent for not procuring an insurance, it is a sufficient defence that the insurance, if made, could not have been enforced by law; nor is it any answer to that

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after referring to the books, refused to pay, alleging that there were not sufficient assets. On the following day it was paid. The plaintiff thereupon brought an action on the case against the defendants, and in his declaration, after setting forth that he was a merchant, &c. and that the defendants were bankers, he alleged a custom of trade in London that bankers, having cash balances of their customers in their hands, and not being under any engagements or liabilities for such customers, should honour and pay the checks of the customers duly drawn for any part of such balances immediately on presentment. Then followed averments that on, &c. he was such customer, and had a cash balance in the hands of the defendants as bankers, and that they were under no liabilities for him—that he drew a check for a part of the balance, which was presented to the defendants and refused by them, contrary to their duty as bankers, &c. There was no averment of special damage, and none was proved at the trial. Parke, J., before whom the cause was tried, was of opinion, that a banker, who received a sum of money belonging to his customer, became his debtor the moment he received it, and was bound to pay a check drawn by such customer, after the lapse of such a reasonable time as would afford an opportunity to the different persons in the establishment of knowing the fact of the receipt of such money, and that the refusal to pay a check, under such circumstances, was a breach of duty for which an action would lie, and he directed the jury to find for the plaintiff, if they were of opinion that such a reasonable time had intervened between the receipt of the money at eleven o'clock and the presentment of the check at three. The jury found a verdict for the plaintiff, with 1*s.* damages, and on motion afterwards made to enter a nonsuit, the Court of King's Bench was of opinion that the action was maintainable, and the direction right.

defence, that by usage and courtesy such insurances are generally paid. (s) Secondly, the damage must appear to have been brought about by the default of the agent. It has been seen that he is not liable for any event produced by following his instructions, or pursuing the ordinary modes of transacting business; (t) but is chargeable with the consequence of ignorance, (u) or the neglect of any precaution prescribed by the accustomed course of business, though not expressly included in his instructions. (v) For the payment of money is a sort of insurance for the due performance of the service undertaken. (w)

2. Since the obligation of an agent is not founded solely upon the commission or reward paid for his labour, but partly upon the reliance induced by his acceptance of the charge, it follows that a gratuitous agent is not exempt from responsibility. (x) But there is a material difference between the circumstances necessary to sustain an action against an agent of this description, and against one who is retained for a commission. For first, in an action for mere non-fea-

(s) 7 T. R. 157; Park, Inst. 303. Ante.

(t) *Russell* v. *Hankey*, 6 T. R. 12; *Ex parte Parsons*, Ambl. 219.

(u) 2 Wils. 325.

(v) 3 Ves. 565; 6 Id. 229; 1 Bro. C. C. 452.

(w) *Shiells* v. *Blackburne*, 1 H. Bl. 159, per Wilson, J.

(x) *Wilkinson* v. *Coverdale*, 1 Esp. Cas. 75; ante, p. 19, and note (6).

sance, it is necessary to state a valuable consideration for the undertaking, and therefore (where there is no public duty) no action lies for the bare neglect of a voluntary service. (*y*)

In the next place, though an action lie for misfeasance in the actual performance of the undertaking, yet in this respect also the responsibility of a voluntary agent is inferior in degree. For whereas a hired agent is bound to possess such a degree of skill as would in general be adequate to the service, a gratuitous agent is not bound to possess such skill, but is only chargeable by proof of gross negligence, (*z*) or ⊥ if he be acting in a public or professional character, ⊥ of having omitted to use that skill, which, from his situation, office, or profession, he ⊥ ought and ⊥ cannot but be supposed to have. For though not bound to possess knowledge, nor liable for error occasioned by the want of it, yet he may justly be required to exert that which he has, or which from his station, office, or profession, he must be presumed to have, and the neglect to do so may be considered as gross negligence. A merchant undertook, without any compensation, to enter at the custom-house a parcel of leather, of a particular kind, which being seized, together with a parcel of his own, by reason of the erroneous

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(*y*) *Elsee* v. *Gatward*, 5 T. R. 143; 1 Esp. Cas. 74; *Coggs* v. *Barnard*, 2 Lord Raym. 909.

(*z*) 2 Atk. 406; 2 Lord Raym. 909.

entry, it was held that he was not answerable for the loss, having acted *bonâ fide*, and to the best of his knowledge. Upon that occasion it was said by Lord Loughborough, that if a man be in a situation or profession to imply skill, an omission of that skill is imputable to him as gross negligence. If, for instance, in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry in them would have been gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries.(*a*)

Section 3.

The remedies hitherto spoken of are such as respect the agent personally in regard to the charge and duty annexed to his character; the following respect the recovery of the specific property in his hands, or the specific produce thereof, and particularly in the event of bankruptcy or death.

1. The right of property remaining in the principal, notwithstanding the possession of the agent, entitles him to maintain an action of trover against the latter for goods, &c. wrongfully and unwarrantably disposed of by him.(*b*) But as this

(*a*) *Shiells* v. *Blackburne*, 1 H. Bl. 161; ‡ and see *Bourne* v. *Diggles*, 2 Chitty's Rep. 311; *Dartnall* v. *Howard*, 4 B. & C. 345. ‡

(*b*) *Anon.* 12 Mod. 602. Post.

action requires not only right of possession of the property claimed in the plaintiff, but also some wrongful act done by the defendant towards it, either in the first taking or the subsequent disposal; and as the first taking is not, in the case of an agent, unlawful, it is necessary, in order to support this action, that there should be some act proved, amounting to a wrongful disposition of the property. This must be either by proof of a disposition contrary to authority, or by that which is evidence of it, a demand and refusal while the property is in the power of the defendant.(*b*) The action, therefore, does not lie for a mere non-delivery;(*b*) nor is it a conversion, if an agent employed to sell goods, not having an opportunity of doing so, deliver them to his own agent for that purpose.(*c*) And if goods be sold with the consent of the principal, no subsequent refusal to account for the produce will support this action;(*d*) nor a demand and refusal after the property is out of his possession, for then it is no evidence of a conversion.(1)

(*b*) *Severin* v. *Keppel*, 4 Esp. 157; *Weymouth* v. *Boyer*, 1 Ves. Jun. 424: and see 6 East, 540, per Lord Ellenborough.

(*c*) *Bromley* v. *Coxwell*, 2 B. & P. 408. (But see *Cockran* v. *Irlam*, 2 Maule & Selw. 301.)

(*d*) 1 Ves. Jun. 424.

(1) ┼ *Smith* v. *Young*, 1 Campb. 441; *M'Combie* v. *Davies*, 6 East, 538; 9 East, 5. If the agent in his answer admit a wrongful delivery of them to another person, that, of course, will be proof of a conversion.┼

But a disposal (*e*) or delivery contrary to express directions, (*f*) is such a conversion as will sustain the action, unless made to one who has a right to the possession, which it lies upon the defendant to make out.

A refusal to deliver property by an agent to his principal, from a bonâ fide apprehension of the consequence of adverse claims, may, as to certain circumstances, be entitled to protection; (*g*) but no case appears to have decided that

(*e*) *Powell* v. *Sadler*, Sitt. after Easter Term, 1806, B. R. West. Trover for three horses. Plaintiff had sent the horses to defendant to be sold the next day; defendant's clerk told him the next day would not be so good a time to sell them as the following *sale day*; in consequence of which the plaintiff said he would send for them back again, which he did the next evening, but they had been sold. In a conversation concerning the sale, the defendant said, "It was a mistake of his clerk, for which he was not answerable." Garrow, for the defendant, insisted that there was no evidence of a conversion. Lord Ellenborough, C. J. "I am of opinion that a conversion has been proved; the horses were entrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; 'as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion.'" See also *Youl* v. *Harbottle*, Peake, N. P. 49; 4 T. R. 264. Delivery by a carrier to a wrong person, held, by Lord Kenyon, to be a conversion. (2)

(*f*) *Syeds* v. *Hay*, 4 T. R. 260; Peake, N. P. 49.

(*g*) Post.

(2) [But if a broker, being authorised to sell goods for a certain price, sell them at an inferior price, he is not liable in trover for the amount of the goods, the proper remedy being by an action on the case. *Dufresne* v. *Hutchinson*, 3 Taunt. 117.]

such a defence can be made at law to an action of trover.(5) It was held, however, upon the following facts, that an agent, against whom a verdict in trover had passed, was entitled to relief in equity. The action was for a subscription receipt in S. S. stock, deposited with the defendant as agent, and delivered by him, through mistake, to another person. The relief was granted, upon evidence that all the receipts, though numbered, were considered as of equal value, and that the plaintiff's receipt was put by the defendant, as usual, into a drawer with several others of the same description, belonging to others, for one of which it had been mistakingly delivered.(*h*) (6)

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(5) ⟂ On the contrary, it has been expressly decided that an adverse claim made by another constitutes no defence to this action, unless that claim be well founded in law. *Wilson* v. *Anderton*, 1 B. & Ad. 450. ⟂

(*h*) *Turner* v. *Crookshank*, Ambl. 187.

(6) ⟂ Up to a recent period the usual mode by which an agent, or rather a middle-man, obtained relief in the case of contending claims, was by filing a bill of interpleader in a court of equity. But now by 1 & 2 Will. IV. c. 58, relief may be obtained on motion in a court of common law. It must be remembered, however, that an agent, in the strict sense of that term, cannot dispute the title of his principal. Ante, p. 53; and see *Stonard* v. *Dunkin*, 2 Campb. 244; and *Hawes* v. *Watson*, [illegible]B. & C. 542. ⟂

SECTION 4.

1. By 5 Geo. II. c. 30, s. 39, factors, brokers, and bankers, were made subject to the bankrupt laws; ‡ and the provision is continued in the new Bankrupt Act, 6 Geo. IV. c. 16, s. 2; ‡ it becomes, therefore, a matter of inquiry, what effect their bankruptcy has upon the rights of their principals, in the specific property entrusted to their charge.

The statute 21 Jac. I. c. 19, s. 10, 11, declared, that if any person shall become bankrupt, and at such time shall, by the consent and permission of the true owner, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon themselves the sale, alteration, or disposition, as owners, such goods shall be liable to the bankrupt's debts.(1) The case, however, of a factor having property of his principal in his possession, though not expressly excepted, has always been

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(1) ‡ The 72d section of the new bankrupt act, which is in substance a re-enactment of the above section, is in these words: "If any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission," exceptions being made as to ships mortgaged and duly registered. ‡

considered as an exception to this rule:(*a*) for, according to Lord Mansfield, the act does not extend to every possible case, where one man has another's goods in his possession; it does not extend to the case of factors who have other men's goods as trustees, or under a bare authority to sell; but the goods must be such as the party suffers the trader to sell as his own.(*b*) And it is said, by Lord Kenyon, that the case of a factor has been so frequently decided, and so much taken for granted for a series of years past, that

(*a*) The first case in which this appears to have been decided is that of *L'Apostre* v. *Plaistrier*, 1708, 1 P. Wms. 318; 1 Atk. 175; before Holt, C. J. and afterwards made a case in K. B. The same point is recognized in *Godfrey* v. *Furzo*, 1733, 3 P. Wms. 185; and in *Ex parte Dumas*, 1 Atk. 234; 2 Ves. 585. The first of these cases, however, which the others seem to have been guided by, is said to have been decided upon the principle, that the enacting part of the statute is restrained by the preamble, and applies only to property originally the bankrupt's. (1 Ves. 243.) A doctrine expressly recognized by C. B. Parker, and Lord Hardwicke, in *Ryal* v. *Rolls*, 1 Atk. 175, 182, and 1 Ves. 371, though it had been treated as a ridiculous notion by Lord Ch. Cowper, *Copeman* v. *Gallant*, 1 P. Wms. 319. Since this opinion, therefore, has been overthrown, and it is now established by the case of *Mace* v. *Cadell*, Cowp. 232, that the act includes property not originally the bankrupt's, the older authorities may be thought to be weakened; but the propriety of the decision in *L'Apostre* v. *Plaistrier*, as to the principal point, has never been questioned, and the authorities cited in the text establish the same principle, though for a different reason. (See *Taylor* v. *Plumer*, 3 Maul. & Selw. 576.)

(*b*) *Mace* v. *Cadell*, Cowp. 233; *Ryall* v. *Rolls*, 1 Atk. 172.

it must now be considered as at rest.(*c*) The reason assigned for this exception is, that as factors and bankers must, by the course of trade, have the goods of other people in their possession, it does not therefore hold out a false credit to the world;(*d*) nor carry to the understanding of the world the reputed ownership.(*e*) It may, however, perhaps, notwithstanding this general principle, be a question of fact,(*f*) whether such a false credit might not, under certain circumstances, be acquired by the possession of a factor, as would bring the case within the act.(2)

(*c*) *Tooke* v. *Hollingworth*, 5 T. R. 226; *Bryson* v. *Wylie*, 1 B. & P. 82.

(*d*) Per Buller, J. 1 B. & P. 83.

(*e*) Per Le Blanc, J. *Horn* v. *Baker*, 9 East, 245.

(*f*) Lord Ch. Cowper considering the false credit as the object of the act, though he admitted the general exception in favour of factors, yet stated, "that if a factor continue a long possession, by which the goods are taken as his own, and credit given to him on that account, it would alter the case; for, if possession and disposition be given to a person who becomes a bankrupt, though no intent of fraud appears, yet if it give a false credit, there is the same inconvenience as if fraud were intended; and it matters not whether it was by fraud, or only by neglect, or out of a humour." 7 Vin. Ab. 89, cited *in marg.* as *Copeman* v. *Gallant*, MS. Rep. Trin. 1716. Note, however, this does not appear in the report of that case. 1 P. Wms. 314.

(2) ‡ A man may be an agent to sell for an unknown principal, and have possession of the goods for the purpose of sale, and yet he may not be, in the strict mercantile sense of that term, a *factor*. And whether in such case the exception in favour of the real owner will apply, may be a question. The following is a case of this kind:—An eminent banker, by a secret

This exception applies as well to agents acting under a *del credere* commission as to others. (g)

And by the application of this principle, it has been held, that where one person, in pursuance

agreement, took from a timber dealer a transfer of a large bargain, which the latter had made for timber to be fallen. By the same agreement he constituted the timber-dealer his agent to dispose of the timber, and to receive and account for the proceeds. The banker paid the price, amounting to 10,000*l.* and the timber was fallen and disposed of by the agent, either for money or in exchange, regular accounts being made out by him to his principal. The dealings all took place in the name of the agent, and he was generally reputed to be the owner. The agent subsequently became bankrupt, and by another agreement with his principal, made bonâ fide after a secret act of bankruptcy, on which the commission was ultimately founded, but more than two months before the date of the commission, transferred the timber of the principal then in his possession, and also other timber which he had obtained in exchange, back to the principal; who, thereupon, openly took possession and dealt with it thenceforth as his own. For the proceeds of this timber the assignees of the bankrupt agent brought an action against the banker, and at the trial Lord Tenterden seems to have been of opinion, that the case fell within the 72d section of the Bankrupt Act, and was not protected by the exception as to factors. But being also of opinion, that a resumption of possession by the true owner, upon an agreement bonâ fide made with the bankrupt more than two months before the date of the commission, would bring it within the protection of the 81st section of the Bankrupt Act, he recommended an inquiry before an arbitrator, for the purpose of ascertaining how much was actually resumed before the two months—which inquiry is still pending. *Shaw* v. *Harvey*, Guildhall Sittings before Michaelmas Term, 1830.

(g) *Garrat* v. *Cullum*, Bull. Ni. Pri. (5th ed.) 42; *Ex parte Oursell*, Ambl. 297.

of an agreement, draws bills upon another for his own convenience, which are accepted, and remits goods to answer the amount, but takes up the bills himself, the acceptor is to be considered as a factor, in respect to the goods remitted, which, therefore, do not pass to his assignees.(*h*) (3)

2. If the goods be detained by the assignees, the principal may sue for them in an action of trover;(*i*) but subject to a lien for every thing for which the estate is creditor.(*k*).

Or if they have been sold before the bankruptcy, and notes, payable at a future day, received by the factor, these, *when distinguishable* from the bankrupt's property, follow the nature of the goods themselves;(*l*) ⸸ and the rule prevails although the substituted property have been

(*h*) *Hollingworth* v. *Tooke*, 2 H. Bl. 502.

(3) ⸸ The expression in the text is scarcely accurate. The acceptor could not be considered as *factor*, in the mercantile acceptation of the word; but he would become, after payment of the bills by the drawer, *trustee* of the goods for him. Now it is a principle of the bankrupt law, of which the case of the factor above mentioned is itself one instance, that nothing will pass to the assignees of a bankrupt to which the bankrupt himself was not entitled *both in law and in equity*. And this principle being kept in view, will serve to explain what follows in the text. The question in all such cases is—1st, was the property clothed with a specific trust? 2dly, if it was, is it now specifically distinguishable from the bankrupt's general stock? ⸸

(*i*) *Scott* v. *Surman*, Willes, 404.

(*k*) Per Eyre, C. J. 2 H. Bl. 504. *Zinck* v. *Walker*, 2 Bl. Rep. 1155.

(*l*) Willes, 404; 2 Ves. 674.

acquired by a breach, and not in pursuance of the trust;(4)⊥ or if the assignees, after the bankruptcy, receive the money due on the notes; or if the goods have been sold upon credit, and they receive the price from the vendees, after the bankruptcy, it may be recovered by the principal in an action for money had and received to his use;(*m*) or by petition to the Lord Chancellor.(*n*) And it makes no difference that the factor has a *del credere* commission.(*n*)

3. This exemption from the effect of bankruptcy is not confined to goods alone, but *specific securities* deposited with an agent for any special

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(4) ⊥ *Taylor* v. *Plumer*, 3 M. & S. 562. In this case a draft for a large amount had been entrusted to a broker for the purchase of exchequer bills. The broker, however, misapplied the draft by purchasing American stock and bullion, with a view to absconding with the proceeds. Accordingly he did set out for America, but being seized before he quitted England, surrendered to the principal the securities of the bullion. A commission of bankruptcy subsequently issued against him, founded on an act of bankruptcy committed before the surrender, and the question was, whether the principal could retain the property surrendered against the assignees. The Court decided that he could; and Lord Ellenborough said, that "if property in its original state and form was covered with a trust in favour of the principal, no change of that state and form could devest it of such trust, or give the factor, or those who represent him in right, any claim of greater validity in respect to it than they respectively had before such change." ⊥

(*m*) *Garrat* v. *Cullum*, Bull. N. P. 42; Willes, 405; *Ryall* v. *Rolls*, 1 Atk. 172.

(*n*) *Ex parte Murray*, Co. B. L. 400; *Scrimshire* v. *Alderton*, 2 Strange, 1182.

purpose, as that of answering other specific bills drawn by the principal;(o) or for the purpose of being presented for payment, and which remain at the time of the bankruptcy, follow the same rule, which has been described as applying to goods in specie: and may, in like manner, and subject to the same lien,(p) be recovered in an action of trover,(q) or by petition.(5) Or if the assignees have parted with the securities, and received the money due upon them, it may be recovered in an action for money had and received to the principal's use.(r)

And if the transaction be clearly that of a deposit, it makes no difference that in calculating the amount to be drawn for, in return for the bills deposited, discount is deducted from the value of the latter for the time they have to run.(s)

Bills not due, deposited with a banker for the purpose of being presented for payment, are recoverable in specie on the amount, if received by the assignees, in an action for money had and received. And this has been so held, notwithstand-

(o) 2 Bl. Rep. 1156; 1 Atk. 233; *Ex parte Dumas*, 1 East, 551; Amb. 297. (*Ex parte Aiken*, 2 Mad. 192.)

(p) *Zinck* v. *Walker*, 2 Bl. Rep. 1156; *Ex parte Dumas*, 2 Ves. 586; *Ex parte Oursell*, Ambl. 298.

(q) 5 T. R. 226; 2 H. Bl. 501; 1 East, 550. *Thompson* v. *Giles*, 2 B. & C. 422.

(5) [*Ex parte Buchanan*, 1 Rose's B. C. 280.]

(r) 1 East, 554; *Giles* v. *Perkins*, 9 East, 12.

(s) 1 East, 550.

ing that the banker, according to custom, enter the bills as cash in his customer's account, charging interest for the time they have to run,(*t*) provided the balance of the cash account, at the time of the bankruptcy, be in favour of the customer.(6)

4. But in order to prevent the effect of the bankrupt laws from attaching upon negociable securities in the hands of a bankrupt agent, there must be a specific appropriation of them, as by lodging of bill for bill; or by the deposit of several, in one entire transaction, to answer a particular purpose; for if they be paid in from time to time upon a general running account, they become effects of the person to whom they are so paid, and are not reclaimable.(*u*) The doctrine is thus generally stated by Lord Hardwicke: "If bills are sent by a correspondent to a merchant here to be received, and the money to be applied to a particular use, and the merchant becomes bankrupt before the money is received on the bills, the correspondent has a special lien in respect of those bills, and the money shall not be divided amongst the creditors at large. But where bills are sent on a general account between the correspondent and the merchant, and as an item in the account, it is otherwise." *Ex parte Hournois*, 10th August, 1754.(*v*)

(*t*) 9 East, 12. (6) See post, note (*a*).

(*u*) *Bent* v. *Buller*, 1 East, 551; 5 T. R. 494.

(*v*) *Ex parte Oursell*, Ambl. 297.

5. But money which has been actually received by the bankrupt, and mixed with his funds, either by negociating the securities in his hands, (*x*) or as the price of goods entrusted to him for sale, (*y*) or to pay over to some purpose which it has not been applied to, (*z*) cannot be separated from his estate, and, as to that, the principal must rate with the other creditors, for money has no ear-mark by which it can be distinguished. (*a*) And

(*x*) *Ex parte Dumas*, 2 Ves. 582.

(*y*) Willes, 404. (*z*) 1 East, 30; 9 East, 9.

(*a*) *Scott* v. *Surman*, Willes, 404. This is the reason assigned both by Mr. J. Willes, and in *Whitcomb* v. *Jacob*, Salk. 160, why money in the hands of an agent cannot be specifically claimed; and this is confirmed by Lord Kenyon's opinion, that if it be in a condition to be distinguishable, it may be claimed like any other thing. Lord Mansfield indeed, 1 Burr. 457, says, "It has been quaintly said, that the reason why money cannot be followed is because it has no ear-mark; but that is not true, the true reason is on account of the currency of it." But it must be observed, that Lord Mansfield was then considering the case, not of *reclaiming* money from the person with whom it had been deposited, but of *following* it into the hands of a third, to whom it had passed in currency. And it is only in that view that he expresses a disapprobation of the reason alluded to. And not only money, but negociable securities, are subject to the same distinction; for though bills of exchange deposited with a banker are reclaimable in his possession, yet they cannot be followed into other hands to which they have come by the banker's assignment. 1 Bos. & Pul. 640.

[Although if indorsed, and consequently negociable, bills are deposited with a banker, the latter has the absolute power of disposing of them, yet such an absolute right may, under circumstances, be qualified. As where the banker is agent for his country correspondent, to receive and pay bills for him, with an

if the factor at the time of the sale agree, instead

allowance for so doing; or where, in an annual account stated between them, the banker has entered the bills as the property of the correspondent; in the one case the right is qualified by considering the banker as a factor, and the bills as remitted for a particular purpose, viz. to be received and carried to account as cash, when due, and his power over them as limited to that object; in the second case, by raising an express declaration of trust, the right may also be considered as qualified. And although the banker enter the bills in his books as cash, or consider them as such, yet that will not extend his qualified right in either case, since his own books are not evidence for him, though they may be against him. *Ex parte Pease*, 1 Rose's B. C. 232. See also *Ex parte The Wakefield Bank*, ibid. 243, where a trust by implication was raised, so as to controul the general authority of bankers to negociate bills indorsed to them. *Ex parte The Leeds Bank*, 1 Rose's B. C. 254.]

‡ As the subject here treated of is one of great importance to all persons engaged in trade, it may be well to state concisely what is conceived to be the present state of the law affecting it; and

1. A banker is to be considered as the agent of his customer. If property of the customer come into his hands to be dealt with in a particular manner, he is, as to that property, the *factor* of the customer, having the rights and liabilities belonging to that character.

2. Bills not due, paid in by a customer to his banker, are, in the absence of evidence to the contrary, presumed to be placed with him as an agent to procure the payment of them when due, and in such case the property remains in the customer. *Giles* v. *Perkins*, 9 East, 12.

3. If they are indorsed by the customer, the *legal* property in them is changed. *Laing* v. *Smyth*, 7 Bing. 284.

4. And if they are also *discounted* by the banker for the customer, they become the absolute property of the banker, and of course pass to his assignees as part of his estate; *Carstairs* v. *Bates*, 3 Campb. 301; and the indorsement is *primâ facie* evidence of discounting. *Ex parte Towgood*, 19 Ves. 299.

5. The taking of the banker's acceptances in exchange for bills

of taking the price in money, to set off a debt of

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paid in and indorsed is tantamount to a discounting, and, even though the banker's acceptances be dishonoured, the bills will nevertheless pass to his assignees. *Hornblower* v. *Proud*, 2 B. & A. 327.

6. But bills may be indorsed by the customer, (and so the legal property be changed,) and may yet remain in the hands of the banker clothed with a trust for the customer, in which case, as has been already said, they do not pass to the assignees of the banker upon his bankruptcy. And the difficulty, in most cases, is to determine whether such a trust exists or not.

7. When the bills are *entered short* by the banker, that is to say, when they are entered as bills not yet available, and not carried to the general cash account, there is no doubt that they do not pass to the assignees, but must be given up to the customer. 1 Rose, 154.

8. And even though the banker have entered them in his own books as cash, and allowed his customer credit in account generally upon them, this will not of itself affect the customer, as the banker's books can be no evidence for himself or his assignees. 1 Rose, 239.

9. Much less if the customer have expressly directed the banker to get payment of them when due, or forbidden him to negociate them; or the course of dealing between them raise an inference of such direction or prohibition. 1 Rose, 243.

10. If the customer have given the banker a limited authority to negociate them under certain circumstances, as in reduction of the cash balance when unfavourable, or the like, this will of course not extend to other circumstances or to more bills than are sufficient for the purpose, and indeed will of itself negative any *general* authority to dispose of them. Ibid.

11. But if a general authority to negociate them had been either expressly given, or is to be inferred from the course of dealing known and assented to by the customer, then, *it seems*, the customer is to be considered as having abandoned all property in the bills, which consequently pass to the assignees.

12. What circumstances are sufficient to raise the inference of such a general authority is a question of some nicety. Lord

his own due to the purchaser, it is the same for

Eldon seems to have been of opinion, that if the bills were entered as cash with the knowledge of the customer, and he drew, or were entitled to draw upon the banker as having that credit in cash, he would thereby be precluded from recurring to the bills specifically. *Ex parte Sargeant*, 1 Rose, 152; *Ex parte Sollers*, ibid. 155; *Ex parte Pease*, ibid. 232; *Ex parte The Wakefield Bank*, ibid. 243; *Ex parte The Leeds Bank*, ibid. 254; and see 18 Ves. 229, 233; 19 Ves. 25, S.C. However, in all these cases his lordship held the assignees to very strict proof of such a course of dealing, and, in the absence of such proof, decided that there was no such general authority. The opinion of Lord Eldon, as conveyed in this dictum, has been adopted and acted upon by the present Vice-Chancellor in a recent case of *Ex parte Thompson*, 1 Mont. & M'Arthur, 102, which was certainly a strong case, for there, in an account of four years, there were but three entries of actual cash paid, the rest of the entries being entirely of bills, against which the remitters had been in the habit of drawing very extensively.

On the other hand it is said, that it is immaterial whether such a general authority exists, either expressly or from the course of dealing, if, at the time of the bankruptcy, the bills in fact remained in specie in the hands of the bankers, and the cash balance were in favour of the customer; and at all events, it is insisted, the circumstance of the customer taking credit for the bills, and drawing, or considering himself entitled to draw against them, does not make them the bills of the banker, because, in the actual course of trade, such a privilege is a consequence of paying in bills. The former part of this proposition is the opinion of Mr. Deacon, and is not without the support of good reasoning, although it must be considered as doubtful.—Law and Practice of Bankruptcy, vol. i. p. 432. The latter part is borne out by the case of *Giles* v. *Thompson*, 2 B. & C. 422, and *Ex parte Armistead*, 2 G. & J. 371.

13. The right to reclaim extends not only to the specific bills or securities, but to the substitutes for, or proceeds of them, so long as they continue in the same hands, and are specifically ascertainable. *Vullamy* v. *Noble*, 3 Mer. 593.

this purpose as if the money had been received.(*b*)

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14. But if the proceeds cannot be distinguished from the general stock of the banker, the right of the general creditors prevails, and the customer must come in rateably with the rest; and herein consists principally the evil of the indorsing of the bills by the customer, as it gives the banker the opportunity of negociating them.

15. Neither can the customer follow them into the hands of third parties who have obtained them bonâ fide and for value, although negociated by the banker against good faith. *Ex parte Pease*, 1 Rose, 288; *Collins* v. *Martin*, 1 B. & P. 648; Ibid. 546.

16. The banker, like a factor, has a general lien for advances made, and a right to be indemnified for liabilities contracted on account of his principal, and the claim of the customer will consequently be modified by the state of the account. Therefore if the cash-balance is against the customer, or if the banker has advanced money specifically upon the bills remitted, or has accepted other bills for the accommodation of the customer, the assignees will have a right to retain the bills, and even to put them in suit, until those sums are repaid and those liabilities discharged, that is to say, they will be entitled to a deduction of the amount in the first case, and to an indemnity in the second. *Jourdaine* v. *Lefevre*, 1 Esp. N. P. C. 66; *Davis* v. *Bowsher*, 5 T. R. 488; *Scott* v. *Franklin*, 15 East, 428; *Bosanquet* v. *Dudman*, 1 Stark. N. P. C. 1; *Bolland* v. *Bygrave*, R. & M. 271; *Ex parte Waring*, 2 G. & J. 403, and the cases before cited passim.

17. It is a consequence of the right to an indemnity, that although the holder of the banker's acceptances in favour of the customer cannot directly come in and claim in his place as against the assignees of the banker, yet if the customer also become bankrupt whilst these acceptances are outstanding, as the holders must be satisfied before the assignees of the customers can be entitled to the bills, the Court of Bankruptcy will order such an arrangement between the two estates as to render the claim of the bill-holders indirectly available. *Ex parte Waring*, 2 Rose, 182; *Ex parte Inglis*, 19 Ves. 345; *Ex parte Parr*, Buck, 191. ↓

(*b*) Willes, 400.

However, since the want of identity is the only reason why money, which has once been confounded with the bankrupt's property, cannot be severed from it in specie, it follows, that if it have never been so confounded, but kept in separate bags, and be distinguishable from the other property, the law is the same as in the case of goods remaining in specie.(c) And, notwithstanding it may have been once confounded with the mass of the bankrupt's property, yet if it have got out of the general fund again, and be in a shape to be identified at the time of the bankruptcy, it may be specifically claimed.(d) As if money, produced by the sale of goods, have been laid out again in any specific thing, which is distinguished from the rest of the agent's estate, the thing so purchased does not pass under his bankruptcy.(e) So where a factor, having money of I. S. in his hands, bought South Sea stock in his own name, but entered it in his book as bought for I. S., it was determined that the stock did not pass by his bankruptcy.(f)

6. In the event of an agent's *death*, money received by him, and not laid out again in any

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(c) Per Lord Kenyon, 5 T. R. 227. And per Buller, J. 1 T. R. 369; and see 3 Burr. 1369.

(d) *Ex parte Sayers*, 5 Ves. 172, 173, per Lord Chancellor.

(e) *Whitcomb* v. *Jacob*, 1 Salk. 160; *Ryall* v. *Rolls*, 1 Atk. 172.

(f) *Ex parte Chion*, 3 P. Wms. 187; ⊥ and see *Vullamy* v. *Noble*, 3 Mer. 593. ⊥

thing else, nor kept separate from his own funds, constitutes a debt due from his estate, as to which the principal is postponed to debtors of a higher class.(*g*) But if goods are sold by a factor upon credit, and the money has not been paid at the time of his death, but is received afterwards by his representatives, it does not become part of the assets, nor is liable to specialty debts; but must be accounted for to the principal, after deducting what may be due from him to the estate.(*g*)

Goods remaining in specie come under the same rules as in the case of the agent's bankruptcy, which has been already explained.

Upon the death of one joint factor, the survivor is bound to account for both.(*i*)

In general, the death of an agent puts an end to personal remedies for misconduct; yet where an agent has been guilty of fraud in selling at an under price, by collusion with the purchaser, though at law the action for the fraud is extinguished by his death, in equity it is considered as a debt for which the estate is liable, and a court of equity assumes jurisdiction upon that ground.(*j*) (5)

(*g*) *Burdett* v. *Willett*, 2 Vern. 638; *Whitcomb* v. *Jacob*, Salk. 160.

(*i*) *Martin* v. *Crump*, 1 Lord Raym. 340; 1 East, 366, ante.

(*j*) *Lord Hardwicke* v. *Vernon*, 4 Ves. 418; and see *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406.

(5) ‡ But as most of these cases can be turned into actions of

contract, upon either the express or the implied engagement of the agent, and as the action of contract survives, it may be laid down as a pretty general rule that the estate of a deceased agent will remain liable to the principal for negligence or misconduct in the course of the agency.

Agents entrusted with the possession of goods or securities are responsible for the fraudulent misappropriation of them, not only to their employers civilly, but to the public criminally.

The occasion of the enactment which introduced this responsibility was as follows:—

Sir Thomas Plumer having contracted in July, 1811, for the purchase of a large estate, employed one Walsh, an eminent stock-broker, to sell out the requisite amount of stock. Accordingly, on the 4th of December, Walsh, who had himself fixed the time, sold out stock to the amount of 21,700*l.* under a power from Sir T. Plumer, and received the money, with a direction from Sir T. Plumer that it should be paid into his (Sir T. P.'s) own bankers (Goslings'), and invested the following day in Exchequer Bills. Accordingly the next day Walsh obtained Sir T. Plumer's check for a sum of 22,000*l.* and received from Goslings' bank notes to the full amount; and on the same day purchased with part 6500*l.* Exchequer Bills, which he lodged at Goslings, taking a receipt. The same afternoon, having first handed over to Sir T. Plumer the receipt for the Exchequer Bills, and given a false account as to the rest, he absconded with the produce of the remaining notes, which he had converted into American Stock and doubloons. He was overtaken, brought back, and tried for stealing the check on Goslings given to him by Sir T. Plumer, but the judges upon a case reserved being of opinion that the facts did not constitute a larceny, he was acquitted.

The case had excited considerable interest, and immediately after the decision the 52 Geo. III. c. 63, was passed, for more effectually preventing the embezzlement of property delivered under such circumstances; and the provisions of this act, which is now repealed, are incorporated into the general larceny act of 7 & 8 Geo. IV. c. 29.

By section 49 of the latter statute it is enacted, "that if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit, such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negociate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been entrusted to him, sell, negociate, transfer, pledge, or in any manner convert to his own use or benefit, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned."

The 50th section provides, that the preceding enactment shall not affect trustees or mortgagees, nor prevent bankers, merchants, &c. from receiving money actually due on securities held by them, or from disposing of securities on which they have a lien, so far as may be necessary for satisfying their lien.

By the 51st section it is enacted, "that if any factor or agent entrusted for the purpose of sale with any goods or merchandize,

or entrusted with any bill of lading, warehouse-keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negociable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent."

By section 52, offenders against these enactments are indemnified from the penal consequences of it "if they shall at any time previously to their being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been bonâ fide instituted by any party aggrieved, or if they shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

CHAPTER II.

THE RIGHTS OF AGENTS.

SECTION 1.

THE duties of agents towards their employers, and the corresponding remedies, being enumerated, the reciprocal rights and remedies of agents, with reference to their principals, come next under consideration. And first of the commission.

1. The commission of an agent(*a*) is either ordinary, or *del credere*. The latter, it has been mentioned, is an increase of the ordinary commission, in consideration of the responsibility which the agent undertakes, by making himself responsible for the solvency of those with whom he contracts.(*b*)

The amount of the commission is either regu-

(*a*) The commissions on a consignment seem to be a good insurable interest. *Flint* v. *Le Mesurier*, Park, 268. See also what fell from Lord Mansfield in *Le Cras* v. *Hughes*, id. ib. and the opinion of the Court of K. B. *Craufurd* v. *Hunter*, 8 T. R. 13.

(*b*) Ante.

lated by a particular contract in each instance, or determined by the usage of trade;(1) or in certain cases it is settled by Act of Parliament,(*c*) viz. by 12 Anne, st. 2, c. 16, s. 2, the rate of brokerage, to be taken by any broker or solicitor, for procuring a loan, is limited to 5*s*. for a hundred pounds, under a penalty of twenty pounds.(2) And by 17 Geo. III. c. 26, 10*s*. per cent. is allowed to a broker or solicitor, for procuring a loan upon annuity. But it has been held, that a

(1) ↓ And if there be no contract express or implied, and no usage, of course no commission can be recovered. ↓ [Thus, where a person performed work for a committee, under a resolution entered into by them, "*that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right,*" it was held, that an action would not lie to recover a recompense for such work, the resolution importing, that the committee were to judge whether any remuneration was due. *Taylor* v. *Brewer*, 1 Maul. & Selw. 290. For cases where certain sums, by way of commission, have been allowed as being regulated by the usage of trade, see *Eicke* v. *Meyer*, 3 Campb. 412; *Cohen* v. *Paget*, 4 Campb. 96; *Roberts* v. *Jackson*, 2 Starkie's N. P. C. 225. See also *Levi* v. *Barnes*, 1 Holt's N. P. C. 412.] ↓ *Chapman* v. *De Tastet*, 2 Stark. N. P. C. 204; *Stewart* v. *Kahle*, 3 Stark. N. P. C. 361. Usage of course in this, as in all other cases, yields to positive agreement. See *Bower* v. *Jones*, 8 Bingh. 65. ↓

(*c*) By 31 Geo. II. c. 10, s. 30, the commission of navy agents is fixed at 6*d*. in the pound.

(2) ↓ And although the words of the act are confined to the procuring of a loan, yet the solicitor, &c. cannot charge a higher commission for labour in and about the procuring of such a loan, though he may not personally procure it. To allow this would be a manifest evasion of the act. *Pryce* v. *Wilkinson*, 2 Bingh. 470. ↓

solicitor who advances his own money, is not entitled to any commission by way of brokerage.(*d*)

2. An agent employed in the management of an illegal contract, cannot recover any compensation for his labour from the person at whose request it was performed, and who has had the benefit of it. As where a person enjoying an office in the customs, employed another to procure the sale of it, undertaking to pay him a proportion of the purchase-money, it was determined that the agent could not support an action for the stipulated compensation, though the service was performed, and the money received by his means.(*e*) ↓ And again, where a stock-broker sued his employer for commission and money expended in the purchase of shares in a company which was illegal under 6 Geo. I. c. 18, it was held, that the action could not be maintained, though the shares had been purchased.(3)↓

(*d*) *Brouckead* v. *Eyre*, 5 T. R. 597. And see post, where the taking illegal commission is an offence.

(*e*) *Stackpole* v. *Earl*, 2 Wils. 133, and see post.

(3) ↓ *Josephs* v. *Pebrer*, 3 B. & C. 630. The rule as to persons connected with illegal transactions is this. Whenever the illegality must necessarily appear in the prosecuting of the claim, the Court will give no countenance to the action; but if the case be so far independent of the illegality that it may be kept out of sight altogether without prejudicing the right of action, the Court will not allow it to be mooted as an objection. Thus in the cases just cited it was a necessary part of the inquiry *in and upon*

[But the Court will not be astute to detect an illegality, and therefore it seems, that although a previous agreement, if carried into effect, might have rendered a contract illegal, yet, if the contract itself be capable of being legally performed by certain precautions being observed, the previous understanding will not deprive the agent of his right to commission. Thus, where A. commissioned B. to get a charter party effected on his ship, *Russian* built, and *British* owned, and she was accordingly chartered to go to *America*, and take in there a cargo of *permitted* goods, rice and cotton being specified, with which she was to sail to *Cadiz*, *Lisbon*, or *Gottenburgh*, as directed; and by a previous agreement, it appeared to have been in the contemplation of the parties, to carry the goods to some port in the United Kingdom, and that the ship should carry no license. it was held, that this was not such an

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what the labour and money had been expended, and *for what* the commission was claimed: and when it appeared that the transaction which was the subject of the claim was illegal, the Court refused its aid. But we have seen before, (p. 62,) that an agent cannot shelter himself from paying over to his principal money which has come to his hands on account of the principal, under a plea that the transaction in respect of which the money was paid was unlawful, because the only inquiry in such a case would be, did the agent receive the money, and on whose account did he receive it. This distinction will serve to explain the cases hereafter cited, as to the claim of an agent to be reimbursed money laid out for his principal in illegal transactions.]

illegal contract as would deprive A. of his right to commission, for procuring the charter party to be effected, because possibly the contemplated voyage might have been legalized.(4)]

3. The right to commission may also be forfeited by the conduct of the agent. Thus, an agent whose duty it is to keep an account, cannot support a charge for his labour, if he have kept none.(*f*)

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(4) [*Haines* v. *Busk*, 5 Taunt. 521.] ↓ In this case the Court were not only not astute in discovering an illegality, but practised great ingenuity to avoid seeing it. The adventure was illegal as contravening the navigation laws. The vessel could not trade to a British port without a license from the Privy Council. It was admitted by Ch. J. Gibbs, that a voyage to London was contemplated, but he said, although the agreement between the parties contained a stipulation that no license was *to be carried by the ship*, it did not follow that it was intended that *no license should be procured at all*. The authority of the case is much impugned by a subsequent decision of *Holland* v. *Hall*, 1 B. & A. 53. "The parties," says Lord Ellenborough, in giving judgment against the plaintiff, "by this agreement appear to have contemplated one entire adventure, which was originally illegal; and *I cannot discover that the illegal purpose was ever abandoned, or that anything was done to legalize it.*" And Abbott, J. adds, "if there be on the face of the agreement an illegal intention, is it too much to say, that the burden lies on the party who uses expressions primâ facie importing an illegal purpose, to show that the intention was legal?" ↓

(*f*) *White* v. *Lady Lincoln*, 8 Ves. 371. Where an agent undertook a business without authority or stipulation for reward, the difficulty of ascertaining the precise wages he was entitled to, owing to his own conduct in keeping no account, was deemed a sufficient reason for disallowing the claim altogether. 11 Ves. 355.

⸸ And if in consequence of his negligence or unskilfulness no benefit accrue to his employer from the service performed, he forfeits his right to commission.(5)

So also if he depart from his character of agent for his employer, and act adversely to him in any part of the transaction. Thus, where a broker having made a purchase for his principal at a month's credit, was induced at the solicitation of the seller to delay the delivery of the goods till the expiration of the credit, and then to tender them on payment, he was considered not only to have forfeited his commission, but to have precluded himself from recovering the money which he had paid for price and duties.(6) ⸸

4. If an agent be made executor to his employer, the character of agent, and the right to commission ceases. A principal resident abroad, who was in the habit of making remittances to his agent, and allowing him commission upon them, having died after appointing the agent his executor, the latter was not allowed to charge commission upon sums which had been sent by the principal in his lifetime, but not received till after his death.(g)

5. If a servant, who by his agreement has engaged to give up his time and attention to the

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(5) ⸸ *Denew* v. *Daverell*, 3 Campb. 451; *White* v. *Chapman*, 1 Stark. N. P. C. 113; *Hamond* v. *Holiday*, 1 C. & P. 384. ⸸

(6) ⸸ *Hurst* v. *Holding*, 3 Taunt. 32. ⸸

(g) *Hovey* v. *Blakeman*, 4 Ves. 596.

concerns of his employer, hire out his service to another, and the employer receive the consideration paid for those services, the servant cannot recover it from him. Thus the master of a ship employed by the owner upon a certain voyage, having let out the services of the ship to government at a stipulated freight, besides a per centage for his own labour, and the whole having been paid into the hands of the owner, it was held that he was not bound to pay over any part of it to the master.(*h*)

‡ By the usage of trade, a ship-broker is not entitled to charge a ship-owner for his commission, or even any remuneration for his labour in procuring a charterer for the ship, unless the charter party be actually entered into; and this even though the contract be broken off by the fault of the owner.(7) The commission allowed

(*h*) *Thomson* v. *Havelock*, 1 Campb. 527. ‡ This is a general rule applicable to all cases in which the relation of master and servant exists. The master is entitled, in the absence of any stipulation to the contrary, to the sole and exclusive service of the servant in the course of employment for which he has retained him. Whatever service, therefore, is performed by him for another, in the same course of employment, is to be considered as done *for the master*. ‡

(7) ‡ *Broad* v. *Thomas*, 7 Bing. 99; *Read* v. *Rann*, Lloyd & Welsby's Mer. Cas. 121, and see the note to that case; *Dalton* v. *Irvin*, 4 C. & P. 289. There seems to have been some doubt about the usage, which may now be considered as set at rest. In *Haines* v. *Busk*, 5 Taunt. 521, the question was not raised, and the broker recovered 2½ per cent. commission, though the charter party had not been effected. ‡

when the charter party is effected is of course proportionably high. And though a charter party have been executed, if the stipulated commission be a per centage on the freight earned, the broker can recover nothing until freight has been earned.(8)

Bankers are allowed by usage a commission for agency: and although 5 per cent. be taken by them as interest on advances, the additional charge for agency, if *bonâ fide* made, does not make the loan usurious:(9) and whether the charge is *bonâ fide* or colourable, is a question for the jury.(10) ⸸

Section 2.

1. Agents are entitled, besides their commission, to be reimbursed all advances made in the regular course of a legal employment. Such are the incidental charges for duties, warehouse-room, &c. and all payments made for the necessary preservation of property committed to their care.(*a*)

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(8) ⸸ *Winter* v. *Mair*, 3 Taunt. 531. ⸸

(9) ⸸ *Winch* v. *Fenn*, 2 T. R. 52, (*n*); *Masterman* v. *Cowrie*, 3 Campb. 488; *Baynes* v. *Fry*, 15 Ves. 120; *Ex parte Jones*, 17 Ves. 332; 1 Rose, 29; 5*s.* per cent. is the usual charge. ⸸

(10) ⸸ *Carstairs* v. *Stein*, 4 M. & S. 192. ⸸

(*a*) 1 Roll. Ab. 124, pl. 7. It has been held, that if a factor resident abroad, at his own risk and peril, evade the payment of foreign customs, he is entitled to charge them as paid. *Smith* v. *Oxendon*, 1 Ch. Ca. 25; Eq. Ca. Ab. 369. But not so of home

And cases may occur in which they are justified in making advances without particular directions, and under exigencies not provided for by the regular rules of their business. Thus, according to Mr. J. Buller, if an agent acting for the best, but without orders, insure a cargo on account of the lateness of the season, or other good cause, he is entitled to charge the principal with the premium.(*b*) And in such a case, even the assent of the principal would be inferred from very slight circumstances.(*b*)

But, in general, authority to advance premiums on insurance must arise either from usage or special direction. An agent empowered by deed to act as husband of a ship in the customary way, and to make advances in that character, is not thereby authorised to insure for the owners with-

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customs, because it is a fraud upon the king. *Borr* v. *Vandall*, 1 Ch. Ca. Ab. 30; Eq. Ca. 370. In a subsequent case, however, Lord Keeper North expressed himself dissatisfied with the reason given for allowing the former, viz. the factor's risk, because he says the factor ventured his master's goods as well as his own life. 18 Vin. Ab. 3. But in a case before Holt, C. J. at Guildhall, a factor of the East India Company carried over £1200 in gold to India, where a custom was due for it and never paid; *et per Curiam*, the factor shall have the benefit, and not the East India Company, for it was due from them, and ought to have been paid; and therefore they cannot make a title to it against one who hath the possession, for that is sufficient in all cases but against him that hath the very right, and the non-payment in this case was at the peril of the factor. 3 Salk. 235, and see Skinn. 149. ⊥ Can this be right? ⊥

(*b*) *Wolfe* v. *Horncastle*, 1 B. & P. 323.

out express orders; nor will the direction of one part-owner be sufficient against the rest, so as to entitle the agent to repayment from them of the sums advanced.(c) But acquiescence by the owners, upon being informed of the insurance, will be sufficient to render them liable.(c)

2. Though, as has been mentioned, urgent danger, without means of referring for instructions to the principal, may sometimes justify advances otherwise unauthorised, it is certain that payments merely voluntary and officious cannot be claimed by an agent, though intended for the benefit of the principal. Thus where an agent, after parting, by the direction of his principal, with the possession of property in his care and management, advanced money to release it from a seizure which occurred afterwards; this was held to be a voluntary payment, and not recoverable by the agent.(d) ⸸ In like manner where brokers acting for the assignee of a bill of lading, after instructions to the contrary, paid, in order to release the cargo, freight which their principal could not have been compelled to pay, they were not allowed to recover back the money so paid, although they had acted as they thought best for the interest of the principal.(1)⸸ And it was

(c) *French* v. *Backhouse*, 5 Burr. 2727; ⸸ ante, p. 23, (8). ⸸

(d) *Edmiston* v. *Wright*, 1 Campb. 88.

(1) ⸸ *Howard* v. *Tucker*, 1 B. & Ad. 712. The case was this. The bill of lading, signed by the captain, expressed that the

held in a late case, that if the principal refuse payment upon a contract made by means of the agent, and the agent, not being himself liable, but for the sake of his own character, which would be affected by the discredit of the principal, choose to pay the money himself, he cannot recover it, though the principal might himself have been compelled to pay it in the first instance.(*e*) However, it would be otherwise, if the agent were a guarantee for the fulfilment of the contract by his principal. And in the case just referred to it was said, that if, by the general usage of the trade, the agent be considered as impliedly pledging his own credit, such usage may be evidence of a guarantee by him to pay, if his principal refused; and, by consequence, he might recover from the principal what he paid for him under the force of that engagement.(*f*) For this reason, an insurance-broker, acting under a *del credere* commission, which renders him liable at all

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freight had been paid in India. The assignee of course took it upon the faith of that statement. It appeared that, in fact, the freight had not been paid, through default of the shipper. The ship-owners consequently claimed the freight, and detained the goods till payment, and it was to procure their release that the broker paid it. The Court considered that the ship-owners were bound by the admission of their agent, the captain, on the bill of lading, and had consequently no claim for freight against the assignee; and this being so, that the payment by the broker (especially after instructions to the contrary) was voluntary, and in his own wrong. ‡

(*e*) *Child* v. *Morley*, 8 T. R. 610. (*f*) Ibid.

events to the assured, is entitled to be reimbursed by the underwriter the amount of sums which he has paid for losses to the assured.(g) But if a broker, not acting under a *del credere*, but an ordinary commission, pay the losses for the underwriter which he was under no obligation to do, such payments are voluntary, and he is not entitled to have them allowed.(h)(3)

(g) *Grove* v. *Dubois*, 1 T. R. 112.

(h) *Wilson* v. *Creighton*, 1 T. R. 113.

(3) ✝ As the author has more than once asserted that an agent under a *del credere* commission is liable in the first instance, and, at all events, to the principal, it becomes necessary to correct the mistake into which he has, in this respect, been led by the often-cited case of *Grove* v. *Dubois*.

It is true that Lord Mansfield in that case says "that a commission *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance." The expression itself is inaccurate, for "the commission *del credere*" is not the *engagement*, but the *consideration* for it; and later cases have decided that Lord Mansfield misapprehended altogether the nature of the engagement.

A factor or broker acting under a commission *del credere* is a *surety* to his principal for the solvency of those with whom the principal deals through his agency. He is in no case, as regards his own employer, himself the principal in any contract which he may make for him, and is liable only in default of those with whom he deals. It follows, therefore, that, before he can be charged, it must be averred in the declaration, and proved at the trial, that the principal debtor has made default. Per Lord Ellenborough, in *Morris* v. *Cleasby*, 4 M. & S. 574.

The dictum of Lord Mansfield in *Grove* v. *Dubois*, though supported by the subsequent cases of *Bize* v. *Dickason*, 1 T. R. 285, and *Weinholt* v. *Roberts*, 2 Campb. 586, was soon questioned by the Courts, (see *Baker* v. *Langhorn*, 6 Taunt. 519, and *Cumming* v. *Forrester*, 1 M. & S. 494,) and at last was, by a solemn

3. In order, therefore, to entitle an agent to indemnity or allowance for disbursements made

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decision of the Court of King's Bench in *Morris* v. *Cleasby*, 4 M. & S. 566, altogether denied. Lord Ellenborough, in delivering the judgment of the Court in that case, after citing the remark attributed to Lord Mansfield, continues thus: "Some expressions nearly similar, and probably founded on them, have fallen from other judges in *Houghton* v. *Matthews*, 3 Bos. & Pull. 489. [His lordship might have included himself in the number of those who had been led into the same misapprehension, 2 Campb. 586.] With all the respect which is due to Lord Mansfield and those judges, we cannot accede to the propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce confusion and uncertainty into the law on this subject." .... "The principal must always be the debtor, and that whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself liable."

The proposition therefore in the text, that an agent may claim or set off payments made by him for which he was under a *del credere* obligation to the party to whom he made them, cannot be supported. The question will, in all cases indifferently, be this: Were they payments which the agent was authorised to make either by positive instructions, or a former course of dealing, or recognised usage?—if they were not, they were voluntary and officious, and he will have no right to reimbursement, or to an allowance in account in respect of them. Indeed, on principle, there seems no reason why, if a man take upon himself to act as the common agent of A. and B., the nature of his obligation to A. should be affected by an agreement between him and B., to which A. is no party. What matters it to A. that the agent has, for a higher rate of commission, entered into an engagement for indemnifying B.?

In practice, the right understanding of this relation is exceedingly important. It will be seen hereafter in what way the contracts of an agent affect the rights of his principal; but it may

by him, they must in general be such as are justified by his instructions express or implied,

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be stated generally here, that if a factor or broker in the making of a purchase act ostensibly in that character, and not as principal, or if after the purchase, and before any change of circumstances has occurred, affecting the condition of the parties, the principal be disclosed, it is from that moment the buyer, (unless under particular circumstances, which will be noticed hereafter,) and not the broker or factor, who is the debtor and the seller. Payment therefore made to the seller by the agent is, in such cases, voluntary; and although, if the principal were not prejudiced thereby, the Court might be astute to detect some implied authority from him to his agent for the making of the payment, yet it is quite clear that wherever either he, or those who have succeeded to his rights, would sustain any detriment thereby, the agent will not be entitled to reimbursement. Thus if the payment be made after the bankruptcy or death of the principal, in which case the seller would be entitled only to share rateably with other creditors according to the assets, the factor or broker cannot be allowed to set off such payments in account as against the assignees of the bankrupt or the representatives of the deceased. This position will be found fully established by the cases of *Koster* v. *Eason*, 2 M. & S. 119; *Morris* v. *Cleasby*, 4 M. & S. 506, and *Gurney* v. *Sharpe*, 4 Taunt. 242.

The same principles are equally applicable to the case of an insurance broker. The true relation of an insurance broker to the assured on the one hand, and to the underwriter on the other, is this: he is the agent of the former in effecting the policy, and doing all which is a consequence of it—of the latter in receiving and paying over the premiums. But by the usage of trade, as between the underwriter and himself, he is presumed from the first to have received the premiums from the assured, and is himself personally liable for them as principal debtor to the underwriter. The assured therefore, in the ordinary case, has nothing whatever to do with the payment of the premiums to the underwriter. On the other hand, the sum due upon the policy in case of a loss, and the returns of premium where the policy has not attached, are a debt

or sanctioned by the subsequent acquiescence of the principal. Thus, if an agent, employed to

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from the underwriter to the assured, and not to the broker. The broker consequently has a right at all times to claim from the assured reimbursement or allowance for premiums, whether actually paid by him or not; *Power* v. *Butcher*, 10 B. & C. 329; Marsh. Inst. 300: 1 Campb. 532; 3 East, 222; 4 Taunt. 246. But he cannot as against the assignees of a bankrupt, or the personal representatives of a deceased underwriter, set off in account losses or returns of premiums paid by him to the assured after the bankruptcy or death, because there he was under no obligation to pay, and his officiousness cannot and ought not to place the assignees or representatives in a worse condition than they would have been in if such payments had not been made. And it is immaterial whether the loss was adjusted before or after the bankruptcy or death, and equally so whether the broker acted under a *del credere* to the assured or not.

These latter propositions will be found illustrated and borne out by the cases of *Minett* v. *Forrester*, 4 Taunt. 541; *Goldschmidt* v. *Lyon*, ib. 534; *Parker* v. *Smith*, 16 East, 382; *Houstoun* v. *Robertson*, 6 Taunt. 448; *Houstoun* v. *Bordenave*, ib. 451; *Peele* v. *Northcote*, 7 Taunt. 458; and see *Wilson* v. *Creighton*, post. It is true that, in the case of *Shee* v. *Clarkson*, 12 East, 507, it was decided, that the broker, being the common agent of the assured and of the underwriter, might, while the premium remained in his hands for the one party, and the policy for the other, after notice of events entitling the assured to a return of premium, and before a determination of his agency by the underwriter, deduct such return, and pay over the difference only to the underwriter. But in *Minett* v. *Forrester*, Mansfield, C. J. puts that decision expressly on the ground, that, by the previous course of dealing between the broker and the underwriter, it might be inferred that the former was specially authorised by the latter to make the payment claimed to be deducted. And it is clear that even in such a case an intervening bankruptcy or death, of which he had notice, would operate as a revocation of such special authority, and render it a payment in the broker's own wrong.

purchase goods at a limited price, exceed that limit, if the principal accept them on his own account, or do not object upon the receipt of them, the agent is entitled to be repaid the price he gave; (*i*) but otherwise not. However, where an agent employed to purchase hemp in a foreign market, and limited as to the price, but not limited as to freight, purchased at a higher than the limited price, in order to save the freight, which was increasing much more than the price of hemp was falling, it was intimated by Lord Hardwicke, that the principal should not be permitted to reject the bargain, being, upon the whole, a gainer. (*k*)

4. An agent is not justified in embarking the property of his principal in any manner not authorised by the terms of his employment, however beneficial to his principal the prospect may be. Thus, if a factor lend his principal's money without instructions, though for his benefit, he has no claim to have it allowed in his account, (*l*) unless the principal, by the receipt of interest, (*m*) or other mark of approbation, assent to such disposition of his money. (4)

(*i*) Beawes, 43; Mal. 82; *Wilson* v. *Cornwall*, 1 Ves. 510; *Prince* v. *Clarke*, ante, p. 31.

(*k*) Id. ib. ante, p. 31, 32.

(*l*) Beawes, 43.

(*m*) 2 Eq. Ca. Ab. 788; *Beaumont* v. *Boultbee*, 11 Ves. 550.

(4) ╀ Ante, p. 31. ╀

5. But even in the execution of his appointed duty, if an agent conduct himself with such unskilfulness as to incur unnecessary expenses, he cannot obtain reimbursement. Thus, an auctioneer, having undertaken to observe the precautions necessary by the statutes 19 Geo. III. c. 56, and 28 Geo. III. c. 37, s. 20, to prevent the duties attaching, if there were no sale, and having by a blunder incurred those duties, was held not to be entitled to recover from his employer what he was obliged to pay on that account.(*n*) So, if an agent, in the selection of goods which he is employed to buy, act with such gross unskilfulness, as to give a high price for a thing of little value, he is not entitled to be allowed more than the worth.(*o*)

6. And though in general all advances made by an agent in the proper execution of a regular authority, are to be repaid by his employer, it is with this qualification, that the transaction out of which they arise is *not of an illegal nature;* for no claim can be supported by an agent for advances made in the prosecution of an illegal dealing, ↓ though sanctioned by, or even undertaken at the request of the principal.(5)↓

In an action on a bill of exchange, drawn by *Wilson* on the defendant, and indorsed by the

(*n*) *Capp* v. *Topham*, 6 East, 392.
(*o*) Roll. Ab. 125, pl. 10.
(5) *Josephs* v. *Pebrer*, 3 B. & C. 639, ante, p. 102.

former to the plaintiff, it appeared, that the defendant had been engaged in illegal stock-jobbing transactions, in which *Wilson* was employed as his broker, and had paid the differences for him; and that the sums so paid by *Wilson* formed part of the consideration of the bill in question, which was known to the plaintiff at the time he received the bill; Lord Kenyon nonsuited the plaintiff; and, upon a motion to set aside the nonsuit, it was contended, upon the authority of the case of *Petrie* v. *Hannay*, (p) that as the broker had actually paid the differences for his employer, the bill in question, which was to secure to him the repayment of what he had advanced, was not vitiated by the original transaction. But the Court (q) was of a contrary opinion, and refused to set aside the nonsuit. (q) The same question soon afterwards occurred in the Court of Chancery upon these circumstances. *Chippendale* employed *Mather*, a broker, to effect an illegal insurance from *Ostend* to the *East Indies;* and in consideration of the money laid out by *Mather* in effecting that insurance, drew a bill upon *James*, and indorsed it to *Mather*. Upon the bankruptcy of the drawee, who had accepted the bill, a petition was presented by *Mather* to be allowed to prove under his commission; which, it was

(p) Post.

(q) Lord Kenyon and Mr. J. Ashhurst. *Steers* v. *Lashley*, 6 T. R. 61.

contended, upon the authority of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*,(r) that he had a right to do. But by the Lord Chancellor: I am perfectly aware of both the cases cited, but I cannot perfectly accede to them. What is called a consent in these cases, is a confederacy to break a positive law. I have often had occasion to think of these cases upon lottery insurances, &c. and it never occurred to me to be possible to state a distinction between them and a case repeatedly adjudged; if a man be employed to buy smuggled goods, if he pay for the goods, and they come to the hands of his employer, the latter cannot be compelled to repay him. The proof was therefore refused.(s) Again, in an action brought by the indorsee of a bill of exchange, the facts appeared to be these. The defendant employed a broker to transact stock-jobbing business for him, who paid the differences, and then drew the bill upon the defendant for the amount, which the defendant accepted. The bill was indorsed to the plaintiff after it was due, so that its origin was open to inquiry; and Lord Kenyon adhering to his former opinion, a verdict was taken for the defendant, which upon the authority of the same cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, was sought to be set aside; but the Court

(r) Post.
(s) *Ex parte Mather*, 3 Ves. Jun. 373.

unanimously approved of the doctrine established by the decision of *Steers* v. *Lashley*, and refused the rule.(*t*)

(*t*) *Brown* v. *Turner*, 7 T. R. 631. The case of *Faikney* v. *Reynous*, mentioned in the text, as adduced in support of the contrary doctrine, was as follows. Debt on bond; the defendant praying oyer of the condition, pleaded the act of 7 Geo. II. c. 8, (the Stock-jobbing Act,) and that the plaintiff and one *Richardson* were jointly concerned in certain contracts prohibited by that statute; that the plaintiff, having paid the differences, the bond in question was given by the defendants, to secure the repayment of *Richardson*'s moiety, who was also a defendant and co-obligee.

The Court of K. B. however, considering this bond not to be given directly for the differences, but to secure the repayment of a sum lent, out of which a new obligation arose, over-ruled the plea. 4 Burr. 2069. In the subsequent case of *Petrie* v. *Hannay*, 3 T. R. 418, the circumstances were these: The plaintiffs were executors of one *Keeble*, who, with the defendant and two others, was concerned in illegal stock-jobbing speculations. Having incurred several losses, they came to a settlement with their broker, who had paid the differences. *Keeble* repaid the broker the whole sum advanced by him, except 811*l.* the defendant's share, for which he drew a bill upon the defendant in favour of the broker, which the defendant accepted. This bill not being paid by the defendant, the broker brought an action upon it against the present plaintiffs, and recovered the amount, no defence being made on account of the illegality of the transaction. The present action was brought to reimburse the plaintiffs the sum recovered against them by the broker, and the declaration was for money paid by them to the defendant's use. The Court of King's Bench, against the opinion of Lord Kenyon, thought the plaintiffs entitled to recover, upon the authority of the case of *Faikney* v. *Reynous*.

But the authority of these two cases, which had been previously questioned by Lord Kenyon, 3 T. R. 421, 6 T. R. 409, and by Lord Loughborough, *Ex parte Mather*, 3 Ves. 373,

A distinction was once laid down as to this point, between transactions which were *mala in*

seems to be further shaken by the following more modern determination; *Mitchell and others, Assignees of Robertson, v. Cockburne, Assignee of Tyler*, 2 H. Bl. 379. The two bankrupts were engaged in an illegal partnership, for the purpose of insuring ships, which was carried on in the name of *Robertson*, who, previous to his bankruptcy, had paid a much larger sum for losses than he had received for premiums. His assignees claimed half this sum from *Tyler;* and the account being referred to an arbitration, the sum of 1636*l.* 13*s.* 6*d.* was awarded to be due to the estate of *Robertson*, for which the action was brought; but the Court of Common Pleas were unanimously of opinion that it could not be sustained. The former cases, however, were not expressly overruled, for it was observed by Lord C. J. Eyre, that they differed from the present, in being one step removed from the illegal transaction itself. In the case of *Aubert* v. *Maize*, 2 B. & P. 271, the point again came under discussion, upon the validity of an award, stating a sum to be due from the defendant, as his moiety of sums paid by the plaintiff, for losses jointly incurred by them upon a partnership insurance of ships. Lord Eldon, C. J. declared his opinion, that the cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, could not be supported without making the Act of Parliament of very little use. And by the unanimous opinion of the Court the award could not be sustained. These cases, therefore, of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, though not expressly overruled, seem at this day somewhat doubtful. Indeed there was a circumstance in them, upon which considerable stress was laid, that is not found in those just mentioned, viz. the giving a new security for the sums paid; but the cases alluded to in the text, of *Steers* v. *Lashley*, 6 T. R. 61; *Ex parte Mather*, 3 Ves. 373; and *Brown* v. *Turner*, 7 T. R. 631; are similar to them in this respect, which, however, did not prevent a decision directly contrary to their authority. But see 13 Ves. 320. (See also *Webb* v. *Brooke*, 3 Taunt. 6; *Ex parte Bell*, 1 Maule & Selw. 751.)

† The cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, are

se, and those which were only *mala prohibita*;(*u*) but such a distinction has been disclaimed by later opinions.(*w*) (6)

7. No allowance is due, either at law(*x*) or in equity,(*y*) to factors, bankers, and other agents, for payments or advances made to their principal, or by their [*qu.* his] order, *after notice of an act of bankruptcy* committed by him. Therefore a banker, who pays the drafts of a person who has money in his hands, knowing him to have committed an act of bankruptcy, though before any docket struck, is liable to be called upon again for

certainly not considered good law at this day. The rule to be collected from all the cases is this: that whenever the party seeking to recover appears to the Court by proof in an action of simple contract, and by pleading and proof in an action on a specialty, to have been in any respect contaminated with, or even privy to the illegal transaction on which the claim is originally bottomed, his remedy, whether upon the primary consideration, or a security substituted for it, is gone. See, in addition to the cases already cited, *Booth* v. *Hodgson*, 6 T. R. 409; *Langton* v. *Hughes*, 1 M. & S. 594; *Cannan* v. *Bryce*, 3 B. & A. 179; *Amory* v. *Meryweather*, 2 B. & C. 575. But an innocent indorsee for value of a security given upon an illegal transaction, is not affected by the illegality, unless expressly declared to be so by statute. *Greenland* v. *Dyer*, Dan. & Lloyd, 147, and see the note. Unless the security were overdue. *Amory* v. *Meryweather*. ⟊

(*u*) Per Lord Mansfield, 4 Burr. 2069; and Ashhurst, J. 3 T. R. 422.

(*w*) 1 B. & P. 298; 2 B. & P. 373.

(6) ⟊ See ante, p. 64, note (*c*). ⟊

(*x*) *Vernon* v. *Hankey*, 2 T. R. 113.

(*y*) 3 Br. C. C. 314.

it by the assignees.(z) But payments to the bankrupt, without such knowledge, are protected(a) by the statute 1 Jac. I. c. 15, s. 14, which enacts, "that no debtor of the bankrupt shall be endangered for the payment of his debt truly and bonâ fide to the bankrupt, before such time as he shall understand or know that he is become a bankrupt."(7) Upon the construction of this clause it was held, where goods had been consigned to a factor and sold by him, and the money received before an act of bankruptcy, upon the faith of which he accepted bills after an act of bankruptcy, but before notice, that the payment of those acceptances after notice was a payment protected by the act, and for which he had a right to be allowed in his account.(b) So if, instead of acceptances, goods had been given at the time in exchange, that would have been deemed a payment within the statute.(c) But where a factor

(z) 2 T. R. 113. The assignees may elect either to proceed against the agent, or against the person to whom the money is paid, thereby adopting the agency, and considering the money as paid to their use. *Vernon* v. *Hanson*, 2 T. R. 287; ✝ *Hammersley* v. *Purling*, 3 Ves. 757. ✝ As to the consequence of the latter mode of proceeding, see post.

(a) 2 T. R. 122.

(7) ✝ Now forming part of the 82d section of the new Bankrupt Act, 6 Geo. IV. c. 16. See post, note (9). ✝

(b) *Wilkins* v. *Casey*, 7 T. R. 711. ✝ And see *Bennett* v. *Spackman*, 1 Carr. 274, S. P., and *Sowerby* v. *Brooks*, 4 B. & A. 525. ✝

(c) Per Lord Kenyon, id. ib.

advanced money upon consignments made after an act of bankruptcy, he was deemed liable to the assignees for the whole of the proceeds, without deducting the amount of the money advanced, for which he was obliged to come in with the rest of the creditors.(*d*) (8) This was before the statute 46 Geo. III. c. 135. But now by that statute all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt, bonâ fide made or entered into more than two calendar months before the date of a commission, are, notwithstanding any prior act of bankruptcy, made good and effectual, in like manner as if no such prior act of bankruptcy had been committed, provided the person so dealing with such bankrupt had not, at the time of such payment, &c. any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.(*e*) (9)

(*d*) *Copeland* v. *Stein*, 8 T. R. 204.

(8) ┼ This was clearly not a payment, but a loan. ┼

(*e*) By section 3, a docket struck is declared to have the effect of notice; but this is repealed by 49 Geo. III. c. 121, s. 1.

(9) ┼ This provision forms the 81st section of the recent act, and is in these words, "And be it enacted, That all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, bonâ fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwith-

8. Whatever an agent is entitled to deduct from the demand of his principal for advances or dis-

standing any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing or transaction, or at the time of executing or levying such execution or attachment, *notice of any prior act of bankruptcy by him committed:* provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment, shall be valid, unless made, entered into, executed or levied more than two calendar months before the issuing the first commission."

The 82d section enacts, "That all payments really and bonâ fide made, or which shall hereafter be made *by* any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and bonâ fide made, or which shall hereafter be made *to* any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, *notice of any act of bankruptcy by such bankrupt committed.*"

Section 83 makes the issuing of a commission notice of an act of bankruptcy, (supposing one to have been committed,) provided the adjudication of bankruptcy have been notified in the Gazette, and the party to be affected may be reasonably presumed to have seen it. A clause which seems to have been introduced in con-

bursements of any kind, may be given in evidence in an action brought against him, without plead-

sequence of the decision of the Court of King's Bench in *Sowerby* v. *Brooks*, 4 B. & A. 525, wherein the issuing of a commission was deemed not to be notice.

It may be necessary to consider the effect of these enactments as regards the factor, banker, or other agent of one who becomes bankrupt.

As to the 81st section.—There seems no reason why a factor or agent should be excluded from the protection afforded to all bonâ fide dealings and transactions; and therefore it is apprehended that any transfer of property by the agent to the bankrupt, or other transaction of the like kind not strictly falling within the definition of a payment, would, up to a period of two months before the date of the commission, be protected by that clause. See *Shaw* v. *Harvey*, ante.

As to the 82d section.—The payment by the bankrupt protected by that clause, is not now in terms confined, as it was by the 19 Geo. II. c. 32, to a payment in respect of goods sold, or of a bill of exchange in the usual and ordinary course of trade, but it is apprehended, that, to make it a "bonâ fide" payment, it must be such as is sanctioned by the regular usage of trade. Per Bayley, J. 3 B. & C. 416; 1 R. & M. 265. Under the former statute it was held, that money received by bankers from a customer after a secret act of bankruptcy, in order to provide for bills which they had accepted for his accommodation, and which were not then due, must be refunded to the assignees; *Tamplin* v. *Diggins*, 2 Campb. 312; and this perhaps, even under the present clause, would scarcely be considered as a *payment*, though, if more than two months before the date of the commission, it might be protected as a bonâ fide transaction by the 81st section. In another case, where, after a secret act of bankruptcy and before a commission, the bankrupt remitted to his bankers a sum of money in repayment of an advance made by them, for the purpose of taking up a bill of the bankrupt, the Court held the assignees not protected; *Holroyd* v. *Whitehead*, 3 Campb. 530; but as that decision proceeded on the ground that the payment

ing it, or giving notice of set-off. For the balance only is the debt; and, upon the principal's bankruptcy, the balance only can be claimed by the assignees.(*f*) (10)

was not made in respect of a bill of exchange within the meaning of the stat. 19 Geo. II. c. 32, it would not apply to the present clause, and such payment would no doubt be valid.

As to payments *to* the bankrupt, it was decided, under the old law, that a payment made by a purchaser, but in anticipation of a consignment of goods which he had ordered of the bankrupt, was not protected; *Bishop* v. *Crawshay*, 3 B. & C. 415; and see *Sanderson* v. *Gregg*, 3 Stark. 72; *Cash* v. *Young*, 2 B. & C. 413; and *Hill* v. *Farnell*, Dan. & Lloyd, 264. But as the judgment rested on the ground that the person who made the payment was not strictly a "*debtor*" of the bankrupt, as required by 1 Jac. I. c. 15, s. 14, it would not, as it should seem, govern a similar case occurring since the new act. It will be observed, that in both sections there is a material alteration in respect of the *notice* by which the transaction is to be affected. Under the former statutes it was liable to be overreached if the party had notice either of a prior act of bankruptcy, or *insolvency*, or *stoppage of payment.* At present it can be affected only by notice of a prior act of bankruptcy.

For other points, not immediately connected with our subject, on the construction of these clauses generally, see Deacon's Law and Practice of Bankruptcy, vol. i. pp. 674, et seq. ⊥

(*f*) *Dale* v. *Sollett*, 4 Burr. 2133. In *Dinwiddie* v. *Bailey*, 6 Ves. 142, the plaintiff, an insurance broker, filed a bill, praying that an account might be taken of money received by himself on account of defendant, and of money due to him for commission, postage, premiums, and an injunction to stay proceedings at law. The bill was demurred to, and the demurrer allowed, because the charges were merely ground of set-off, or such as the plaintiff might prove in defence to the action at law; and see 1 T. R. 102. ⊥ See ante, p. 59, (*m*). ⊥

(10) ⊥ However it is advisable, for the most part, to give notice of set-off. ⊥

SECTION 3.

1. Besides the means of indemnity which all agents have by action or set-off, the law allows to factors the additional security of a lien upon property in their hands. A lien has been defined to be a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. (*a*) It is not, therefore, founded in property, but is an equitable right to retain the property of another; (*b*) and has been pronounced to be for the convenience of commerce, and on the side of natural justice. (*c*)

Lien is either *particular* or *general*. (*d*) A particular lien is the right to retain the thing itself, in respect of which the claim arises. (*e*) A general lien is a right to hold, not only for demands specifically arising out of the thing retained, but for the general balance of accounts, ‡ in respect of dealings of the like nature. ‡ The first is a right, recognised by the common law, with some exceptions, (*f*) to keep possession of that upon which a man has expended his labour or money, till his demand be satisfied. (*f*) But the latter,

(*a*) 2 East, 235, per Lord Ellenborough, C. J.

(*b*) Per Buller, J. 6 East, 20, *in notis*.

(*c*) *Kirkman* v. *Shawcross*, 6 T. R. 19; *Green* v. *Farmer*, 4 Burr. 2220.

(*d*) 3 B. & P. 494.

(*e*) 4 Burr. 2214, 2223; 1 Atk. 236; 7 East, 230.

(*f*) *Ex parte Deeze*, 1 Atk. 228; but see *Wilkins* v. *Carmichael*, Doug. 100; Abbot, 124, as to ships.

being an extension of the general right,(*g*) is only to be established either by express contract, or by that which operates as evidence of a contract,(*h*) the usage of trade,(*i*) or previous dealings between the same parties on the footing of such a right.(*k*) (1)

2. It would obviously be detrimental to the free course of trade, if factors, who are employed for the facility of merchandize, could not part with the possession of property in their hands, without parting with their best security for the advances necessarily made by them upon that property, which would be the consequence, if they had only a particular lien. Whether for this reason or not, it is, however, now fully settled that a factor has a lien upon each portion of goods in his possession, for his general balance, as well as for charges arising upon those particular goods. This right seems first to have received the sanction of legal authority in the case of *Kruger* v. *Wilcox*,(*l*) in the year 1754, since which time it has never been controverted, though before it had been considered as dubious,(*m*) but is now re-

(*g*) 3 B. & P. 494.

(*h*) *Kirkman* v. *Shawcross*, 6 T. R. 14.

(*i*) *Rushforth* v. *Hadfield*, 7 East, 224.

(*k*) *Ex parte Hockenden*, 1 Atk. 236; 4 Burr. 2221; 6 East, 28.

(1) ┼ And the right not being favoured by the Courts, strict and cogent proof is required to establish it. ┼

(*l*) Ambl. 252.

(*m*) *Chapman* v. *Darby*, 2 Vern. 117; per Lord Mansfield, 4 Burr. 2218. It is stated by Beawes, (2d ed.) 43, that if a factor

ceived as a known principle of law, too clear to be disputed.(*n*) And though Lord Hardwicke, in his inquiry, seems to have in view only the case of a foreign factor, and the author of the *Lex Mercatoria* appears to found the origin of the right upon the factor's residence abroad, yet no doubt is now made that a home factor enjoys the same advantage.(*o*) And the lien attaches not only upon goods in specie, but upon the proceeds(*p*) and securities received in the course of his business.(*q*)

⸸ But the security must be received in the ordinary course, and not procured by a misrepre-

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having goods in his hands, accept bills drawn by the principal, and afterwards the principal breaks, it has been conceived that he must answer the bill notwithstanding, and come in a creditor for so much as he was enforced, by reason of his acceptance, to pay; but puts a quære if equity may not relieve in such cases. In the case of *Hereford* v. *Powell*, 1695, Comb. 349, Lord Holt distinguishes between the case of a factor having money in his hands, in which case he may detain, and cannot bring an action, unless the principal refuse to account, and his having laid it out by direction in particular goods, in which case he cannot detain, and may therefore bring an action *quod nota*, says the reporter. In *Chapman* v. *Darby*, 2 Vern. 117, anno 1689, it was held that a factor, whose principal died indebted by specialty more than the worth of his assets, could not detain goods in his hands. ⸸ But this decision would not now be considered good law. ⸸

(*n*) 6 T. R. 262; 6 East, 23, note; *Man* v. *Shifner*, 2 East, 529; 1 Burr. 494; 1 Bl. Rep. 102; 2 Burr. 937.

(*o*) 1 B. & P. 498.

(*p*) *Drinkwater* v. *Goodwin*, Cowp. 251, 255; 2 East, 227; 3 B. & P. 489.

(*q*) Willes, 400.

sentation of the purpose for which it is wanted. Accordingly where a factor of the owner of a ship at a foreign port obtained from the master the certificate of the ship's registry, in order, as he said, to pay the tonnage-duties at the custom-house, and without stating that he should claim to hold it as a lien, it was decided that he could not retain it for his general balance against the assignees of the ship-owner.(2)

Packers also, where they are in the nature of factors, are entitled to the same lien.(*r*)

It is understood likewise, and has in repeated instances been considered as a settled point, that insurance brokers have a lien upon policies for their general balance.(*s*)

(2) *Burn* v. *Brown*, 2 Stark. N. P. C. 272.

(*r*) From the case *Ex parte Deeze*, where a packer was held entitled to retain for a general balance, and from the expression of Lord Hardwicke in *Ex parte Ockenden*, 1 Atk. 237, "that the reason of his determination in *Ex parte Deeze* was, that there was evidence of a usage among packers to lend money to clothiers, and the clothes to be for a pledge, not only for the work done, but for the loan likewise;" it may be conceived that the rule is established generally as to packers, in the same manner as factors; but from the manner in which Lord Mansfield speaks of that case, 4 Burr. 2222, it would appear, that the decision turned merely upon evidence, that the packer was in reality a sort of factor, and as such entitled to the lien, and that similar proof would be necessary, before a packer, as such, could claim that right.

(*s*) *Whitehead* v. *Vaughan*, Co. B. & P. 579; *Parker* v. *Carter*, id. ib.; and see *Castling* v. *Aubert*, 2 East, 325, 331, 526; *Godin* v. *The London Assurance Company*, 1 Bl. Rep. 102; *Hovil* v. *Pack*, 7 East, 164.

Bankers also are deemed to have a lien upon bills deposited with them, for a general account.(*t*) ⊥ But if the securities have been deposited as a pledge for a specific sum, the banker cannot claim a lien upon them beyond that sum, though his customer may be indebted to him on the settlement of accounts to a far greater amount. (3) ⊥

[Neither of course has a banker a lien for his general balance, on muniments casually left in his banking house, after he has refused to advance money on them, as a security. (4) In cases, however, where the banker has such a lien, his assignees may, in the event of his bankruptcy, sue the parties to the securities, deposited with him, and recover from them the balance due to the banker by his customer. (5)]

⊥ And Lord Ellenborough has held, that a banker may be considered as holder for value of bills deposited with him as a collateral security, when his acceptances for his customer exceed the cash balance; and further, that he may put them in suit against the acceptors, though the customer may have received the money from the drawers. (6) ⊥

(*t*) *Davis* v. *Bowsher*, 5 T. R. 488; *Boulton* v. *Puller*, per Eyre, C. J. 1 B. & P. 546; *Giles* v. *Perkins*, 9 East, 14.

(3) ⊥ *Vanderzee* v. *Willis*, 3 Bro. C. C. 21. ⊥

(4) [*Lucas* v. *Dorien*, 7 Taunt. 278.]

(5) [*Scott* v. *Franklin*, 15 East, 428.]

(6) ⊥ *Bosanquet* v. *Dudman*, 1 Stark. N. P. C. 1. ⊥

3. In examining the effect of this right, as it affects the parties, three points are to be considered: first, in respect of what claims the right exists; secondly, by what circumstances it may be prevented from attaching, or lost after it has attached; thirdly, how it is taken advantage of.

First, The debt, in respect of which a lien is claimed by a factor or other agent, must be due to him in his own right, and not as agent for another person. Thus, in a case where *Mathews & Co.* as brokers for G. and D. had sold goods to one *Jackson* upon credit, who afterwards committed to them some goods of his own to sell, as his brokers, it became a question upon the insolvency of *Jackson*, whether the brokers had any lien upon the latter goods for the price of the former, (there being a balance due to him from G. and D.) which was decided in the negative.(*u*)

It must also be a debt due from the person for whose benefit he is acting. Thus, where an agreement was made between the owner of goods and a creditor, that they should be sold to pay the creditor, and the factor of the owner was fixed upon to sell them, with knowledge of the agreement, it was held, that the factor had no lien for another debt due to him by the owner of the goods.(*w*)

Further, if an agent unnecessarily make himself

(*u*) *Houghton* v. *Matthews*, 3 B. & P. 485.
(*w*) *Weymouth* v. *Boyer*, 1 Ves. Jun. 416.

liable to others for work done to his employer's property, he does not acquire a right to retain the property for the amount of what he pays under such liability. As if a servant deliver cloth to a tailor, to make into clothes, the tailor indeed will have a lien on the cloth for his work; but though the servant pay the tailor his charge, that will not give the servant a lien on the clothes.(*x*)

(*x*) 9 East, 433. It is determined that the master of a ship has no lien upon it for money expended in the payment of demands for repairs, &c. either at home or abroad. *Hussey* v. *Christie*, 9 East, 426; Abbott, 124. See 13 Ves. 594. In the case of *White* v. *Baring*, 4 Esp. 22, it is said to have been ruled by Lord Kenyon, at Nisi Prius, that a master has a lien on the *freight*, for debts to which he had made himself liable for stores, whether furnished at home or abroad, does not distinctly appear. A rule for a new trial was granted, but the matter was settled. [The decision, however, has been since overruled by the case of *Smith* v. *Plummer*, 1 B. & A. 575, in which it was decided that the master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo.] But though at law no lien exists in the captain, under the circumstances above described, yet a court of equity, in considering the demands of different parties upon the money arising from the sale of the ship, has allowed that of the master for disbursements abroad. *Walkingson* v. *Barnardiston*, 2 P. Wms. 269. ⊥ However, this decision also has been overruled in a subsequent case of *Hussie* v. *Christie*, 13 Ves. 594, where the like question arising, the Lord Chancellor treated it as a purely legal question, and sent the case to the Court of King's Bench for the opinion of the judges of that Court, who were unanimously of opinion, that although the master might hypothecate the ship for necessary repairs in the course of a foreign voyage, yet he had not himself any lien upon it. 9 East, 426.⊥

[So, where a broker purchasing goods for his principals, without their knowledge, added to the terms of purchase, which the principals had agreed to, a guarantee by himself of their bills, and, after the goods were delivered to the broker, the principals became bankrupt, it was held, that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had any lien on them, for the money he had paid on his guarantee.(7)]

However, if a factor, having become surety for his principal, ↓ with the knowledge and consent of the principal, ↓ has been compelled to pay the debt, he has a right to consider it as part of the general account, for which he is entitled to retain.(*y*)

In general, the rules are the same with respect to the nature of the claims for which a lien exists, as those which regulate the right of the agent to an allowance in account, which have been already considered.(*z*)

Though a factor have [has] undoubtedly a lien for the balance of a general account, connected with his employment as factor, it has been a question, whether it is confined to such demands, or whether it may not comprehend all accounts between the parties, as well prior as subsequent to the

(7) [*Gurney* v. *Sharpe*, 4 Taunt. 242.] ↓ And see ante, p. 111, note (3). ↓

(*y*) *Drinkwater* v. *Goodwin*, Cowp. 251.

(*z*) Ante.

commencement of the employment. In a case already referred to upon another point, the question arose under these circumstances. The defendant *Matthews*, as broker for persons named *Greatham* and *Dixon*, sold to *Jackson* certain logwood, &c. upon credit. Soon after that sale, *Jackson* put into the hands of the defendant other indigo of his own, to sell as his broker, no advance being made by the defendant upon this indigo, nor any debt existing between him and *Jackson*, other than what was due for the goods of *Greatham* and *Dixon*. Indeed the commission to sell the indigo in question was the first time *Jackson* had ever employed the defendant as broker. While the indigo still remained unsold in the defendant's hands, *Jackson* became a bankrupt, upon which his assignees claimed it, and tendered payment of any charges incurred in respect of that article. But the defendant insisted upon a right to retain for the debt due from *Jackson* for the logwood, &c. of *Greatham* and *Dixon*, previously sold to him, as before-mentioned.

The principal point in the case was, whether the defendants could avail themselves of a debt which was not due to them on their own account;(*a*) but another question was very fully considered, *viz*. whether the debt, having arisen previous to the employment as agent, could give

(*a*) *Drinkwater* v. *Goodwin*, Cowp. 251.

the defendants a right to retain upon the ground of a general lien. Upon this point the Court of *Common Pleas* was not unanimous; but, according to the opinion of the majority of the judges of that court, a factor or broker has not any general lien in respect of debts, prior to the time at which he begins to be employed in that character. This is agreeable to the opinion of Mr. J. Lawrence in another case,(*b*) "that the doctrine of liens applies only to cases where goods have been delivered, in the nature of a pledge, and that if the persons claiming the lien had never, before the transactions in question, acted as brokers of the party against whom they claimed, it could not be considered that the goods were deposited as a general pledge." And, indeed, if all debts whatsoever were supposed to be included in a factor's lien, it might be extended to such as have no reference to trade or mutual dealing; as, for instance, to a demand for rent,(*c*) which seems to be departing very far from any principle upon which the right can be supposed to be founded.(8)

(*b*) *Walker* v. *Birch*, 6 T. R. 258, post.

(*c*) Per Heath, J. *Houghton* v. *Matthews*, 3 B. & P. 485.

(8) ↓ There can be little doubt that the lien extends only to the results of transactions which were within the course of dealing of the agent as such agent. See *Olive* v. *Smith*, 5 Taunt. 56; *Weldon* v. *Gould*, 3 Esp. 268. ↓

⊥ The charges in respect of which the lien is claimed must be such as are warranted by the usual course of dealing, and are necessarily incurred by the agent in the proper discharge of his duty. The expenses of a suit at law, and a reference arising therefrom, have been allowed to constitute such a charge, where it appeared that the proceedings were properly taken by the factor to obtain possession of the goods consigned, which were wrongfully withheld by the master of the ship.(9) ⊥

4. The second point to be ascertained is, under what circumstances the lien takes place.

In order to found the lien of a factor, it is necessary that the property upon which it is claimed should have been in his possession; for if goods, after being consigned to a factor, are stopped in transitu,(10) no such right vests in him; and the owner may exercise the power of stopping the goods, so as to prevent the factor gaining any lien upon them, notwithstanding he has accepted bills drawn upon him on the faith of the consignment. This appears from the following autho-

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(9) ⊥ *Curtis* v. *Barclay*, 5 B. & C. 141. ⊥

(10) ⊥ This term, "stoppage in transitu," has acquired a secondary and technical meaning in the mercantile law, and is confined to the case of an unpaid vendor stopping the goods on their way to an insolvent vendee; it is not therefore applicable, in this sense, to the case of principal and factor. ⊥

rity.(d) Steine, a merchant in Scotland, had been in the habit of consigning cargos to Sandiman and Graham at London, as factors, who from time to time used to accept Steine's bills in confidence of those cargos. At the time [when] the goods, the subject of the action, were consigned to Sandiman & Co., the latter were under acceptances for 29,000*l.* part of which was for those goods. A bill of lading unindorsed and invoice had been received by them; but when the ship arrived, on the 21st of February, they had stopped payment, and refused to intermeddle with unloading the cargo, though they had orders from Steine to unload on her arrival. But on the 8th of March they paid some money in part of the freight. About the middle of the same month the goods were demanded of the captain by Sandiman & Co.'s assignees, but refused; the captain having orders from the assignee of Steine, who had become bankrupt on the 4th of March, to withhold

(d) *Kinloch* v. *Craig*, 3 T. R. 119. It has been held, however, that a factor, who is in advance to his principal, has such an interest upon goods consigned to him, upon which he would have a lien if they arrived, as entitles him to recover upon a general policy on goods effected by him for his own security. *Godin* v. *The London Insurance Company*, 1 Burr. 489, 494; *Flint* v. *Le Mesurier*, Park, 11; and vide Park, 269, *in notis*, where interest was declared in a policy to be "on commission of the plaintiff, as consignee of the cargo, valued at 1500*l.* Lord Kenyon expressed a strong opinion that this was a good insurable interest. *Barclay* v. *Cousins*, 2 East, 544.

them. The bills accepted by Sandiman and Graham had not been paid. An action was brought by their assignees to gain possession of the goods, and a verdict was given in their favour, which was set aside and a new trial granted, the ground of which was declared to be, that though, as between consignor and factor, the latter has a lien upon all consignments, yet the position is to be understood with this restriction, that he has obtained possession of the cargo. Upon the second trial there was a special verdict; but the Court of King's Bench, without argument, gave judgment for the defendant, and that decision was affirmed in the House of Lords, by the unanimous advice of the judges.(*e*)

So if goods come into the possession of a factor not by the consignment of the owner, but by consignment or delivery of the person to whom he has transferred the property in them,(11) the factor can have no lien upon them for advances

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(*e*) 3 T. R. 783; 1 East, 4. But where there was an agreement, that, in consideration of being permitted to draw bills, the drawers should consign goods to the drawees for sale on their account, the latter to receive the usual commission on the sales, and out of the proceeds to indemnify themselves against their acceptances; it was held, that this agreement did not create the relation of principal and factor, but that the consignees, to whom bills of lading were remitted, were entitled to the goods, though the consignors had become bankrupts before the ship sailed, and their assignees had got possession. *Haille* v. *Smith*, 1 B. & P. 563.

(11) ⸸ As by indorsement and delivery of the bill of lading. ⸸

made to the owner.(*f*) ↓ And where brokers without any direction from their principal, and after an act of bankruptcy committed by him, took into their own possession goods which they had purchased for him, but which, up to that time, had remained in the warehouse of the seller at a rent payable by their principal, it was held that they could, by this unauthorised transfer of possession, obtain a lien upon them as against the assignees. (12) ↓

However, the death of the principal, between the consignment and arrival of the cargo, does not divest the lien which a factor may have acquired by the acceptance of bills upon the faith of the consignment. (*g*)

5. But even where the lien is not prevented in the manner just described, by the exercise of the owner's right to stop them in transitu, (13) yet the nature of the contract between the principal and the factor may be such as to exclude the lien which would otherwise exist, and of which the following case affords an instance. Caldwell & Co. deposited a quantity of cotton with Greaves & Co. as brokers; and the object of the deposit was to enable Caldwell & Co. to raise money

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(*f*) Per Eyre, C. J. 3 T. R. 787.

(12) ↓ *Taylor* v. *Robinson*, 2 Moore, 730; and see *Nichols* v. *Clent*, 8 Price, 547. ↓

(*g*) *Hammonds* v. *Barclay*, 2 East, 227.

(13) ↓ See ante, note (10). ↓

upon the credit of the broker's certificate, which was to be made out and given to them by Greaves & Co. For that purpose an acknowledgment was given in this form, (the name of J. Forbes being used instead of that of Caldwell & Co.) "Received from Mr. J. Forbes (so many bags of cotton, &c. amounting, &c.) for sale; for the net proceeds of each parcel, when and as received, we promise to be accountable to the said J. Forbes, or his order." Both parties becoming bankrupts, the cotton which remained unsold was demanded by the assignees of Caldwell & Co. from the assignees of Greaves, and, upon their refusal, an action of trover was brought, in which it was contended, that Greaves & Co. as factors, had a lien upon the cotton, to indemnify themselves against the payment of certain bills of Caldwell & Co. indorsed by Greaves & Co., which might be proved against the estate of the latter. Lord Kenyon, after stating that there is no doubt but that in general a factor has a lien for his general balance, on the property of his principal coming into his hands, observed, that the question arose upon the application of that proposition to the present case. It is, says his lordship, a maxim as old as our law, *conventio vincit legem*. The parties may, if they please, introduce into their contract an article to prevent the application of a general rule of law to it. In order to determine the present case, it is not necessary to consider how the case would

have been, if there had been no express stipulation between the parties; for the whole resolves itself into this, that the goods were deposited for a particular purpose. This lien, which a factor has on the goods of his principal, arises upon an agreement which the law implies; but where there is an express stipulation to the contrary, it puts an end to the general rule of law. Here the parties are bound by their express stipulation, which excludes all idea of a lien, and the goods in question, not having been sold, are to be returned to the plaintiffs, who represent Caldwell & Co. The rest of the Court concurred in this opinion.(*h*)

So where goods were placed in the hands of a factor, in consequence of an agreement communicated to him, that they were to be sold for the benefit of a particular creditor of the owner, the factor, it was held, could not retain for a demand against the owner.(*i*)

6. As the lien may be prevented from attaching, so, after it has attached, it may be lost or destroyed. Goods subject to a lien are in the nature of a pledge,(*k*) which being personal, cannot be transferred;(*l*) so that if the goods be parted with, the lien in general is lost.(*m*) In the case of

(*h*) *Walker* v. *Birch*, 6 T. R. 258.
(*i*) *Weymouth* v. *Boyer*, 1 Ves. Jun. 416.
(*k*) 3 T. R. 123; 6 T. R. 263.
(*l*) *Daubigny* v. *Duval*, 5 T. R. 606; 1 East, 337; but see post.
(*m*) 1 Burr. 494; 1 Bl. Rep. 114; 1 East, 4.

Kruger v. *Wilcox*, where the right of factors to retain for a general balance was first established by a legal decision, it became necessary also to determine whether the factor, by giving up the possession, had not abandoned his right under these circumstances:—The principal, having consigned to his factor a cargo of logwood for sale, soon after came to England, and being desirous to save the commission by selling the logwood himself, directed the factor to give it up to a broker whom he named, which was accordingly done. The Lord Chancellor, who was assisted by the information of four of the principal merchants of London as to the custom, came to the following conclusion upon the second question: "I am of opinion that the factor has parted with his right, and that it is for the benefit of trade to say he has. All the merchants agree, that though the factor may retain for the balance of an account, yet if the merchant come over, and the factor deliver goods to him, by his parting with the possession, he parts with the specific lien. Such is the law of the land as to retainers in other cases.(*n*)

In a case of a much more modern date it was decided that a fuller, who by custom was entitled to a lien upon goods for a general balance, had, by shipping the goods to the order of his em-

(*n*) Ambl. 254; 1 Burr. 494.

ployer, lost the right to detain them, though he regained possession of them during the passage.(*o*)

But though the right to retain for a general balance was held, in both these cases, to have ceased with the possession; yet, in the first mentioned case, the charges upon the goods themselves, as customs, &c. were allowed in equity.

7. These rules, however, are subject to the following qualifications. 1st. If a factor in a foreign country procure goods, on his own credit, he is considered as the consignor, and entitled to stop them in transitu, after a shipment to the principal.(*p*) 2d. Though the actual possession be parted with, yet there may remain such a constructive possession as will continue the lien. Thus, though a shipment by one who has a general lien to the order of the principal, be an abandonment of the lien, yet it would be other-

(*o*) *Sweet* v. *Pym*, 1 East, 4.

(*p*) *Feize* v. *Wray*, 3 East, 93; *D'Aquila* v. *Lambert*, Ambl. 400; *Snee* v. *Prescott*, 1 Atk. 244. (*Usparicha* v. *Noble*, 13 East, 338.)

‡ *Feize* v. *Wray*, was a case decided on its own peculiar circumstances, and cannot be considered as establishing any principle. It had nothing whatever to do with the lien, or other rights of a factor *as such*. The foreign correspondent by whom the goods were shipped was considered by the Court as having acted in that shipment rather as the vendor of goods to his principal, than as his mere agent for consignment. See the subsequent case of *Siffkin* v. *Wray*, 6 East, 371.‡

wise if the shipment were to his own order.(q)(14) So where an agent, who has a lien upon property to a certain amount, deposits it with a third person as a security to that amount, apprising him of the lien, and appointing him to keep possession as his servant, the lien is not thereby extinguished.(r) 3d. It appears to follow, from what has been said of the nature of a general lien, that though the goods which are subject to it have once been parted with, yet if they return into the same possession in the course of dealing, the lien would be restored; because, as the right would attach upon any fresh goods coming into possession, which is the character of a general lien, there seems to be no reason why it should not equally attach upon the same goods coming back again. And the following authority seems to support that conclusion. This was the case of an insurance broker, who, it has been shown, is considered for this purpose as entitled to the same rights as a factor. The facts were in sub-

(q) *Semb.* 1 East, 4.

(14) ┼ He retains by that means the entire disposition and control of the goods.┼

(r) *M'Combie* v. *Davies*, 7 East, 7; *Mann* v. *Shifner*, 2 East, 529, post. Also, where securities, upon which the holder had a lien, were parted with, in contemplation of their being replaced by another security, which did not take effect by the substituted securities proving unavailable; it seems to have been the opinion of the Court of King's Bench, that an allowance in account might be claimed to the amount of the lien. *Vernon* v. *Hankey*, 2 T. R. 119.

stance, that *Vaughan*, an insurance broker, being in possession of a policy which had been put into his hands to get it underwritten, returned it to his employer as soon as it was filled up. Afterwards, an average loss having occurred, *Vaughan* obtained the policy for the alleged purpose of collecting the average; but with a view at that time, which he did not disclose, of holding it as a security for his balance. The principal became bankrupt, and the losses were not received by the broker till after the bankruptcy. In an action by the assignees, in which it was insisted on their part, that the broker could not retain for his debt: 1st. Because the debt sued for was not due till the receipt of the money by him, which was after the bankruptcy; 2d. That the broker, having once parted with the policy, lost his lien upon it, although it afterwards came into his hands again; Lord Mansfield said, "this is an item of the mutual account; and I think there is a lien. It is the justice of the case that there should be a general lien; and the lien revives when the policy comes again into the hands of the broker." (s) (15)

(s) *Whitehead* v. *Vaughan*, Co. B. L. 579.

(15) ┤ There is no doubt that if the documents come back into the possession in the ordinary course of business, the general lien attaches upon them again; but this is not a *revival* of the former lien. The mode in which the broker in this case obtained possession of the policy ought to have prevented the lien from attaching. *Burn* v. *Brown*, ante. And see further on this

There is also another case in which a factor, by parting with the possession of goods, does not forfeit the benefit of his lien, which is where he sells them according to his authority. For, as it would be productive of great inconvenience, if a factor could not sell goods committed to him for sale, without losing the security he has by the possession of them, it has been determined, that the proceeds or securities are subject to the same deductions or lien which the goods in specie were.(*t*)

┼ The right of lien may, however, be lost or waived by the special agreement of the parties; for *conventio vincit legem*, and if the factor enter into a contract inconsistent with the exercise of the right (as if he stipulate for a particular mode of payment) he must be understood as waiving it.(16)┼

8. An agent, employed by another, who is himself an agent, with notice, cannot avail himself against the principal of a general lien, which he may be entitled to as against the person immediately employing him. Thus *Jennings*, an English merchant, resident in England in time of

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subject, *Levy* v. *Barnard*, 2 Moore, 42; *Wallace* v. *Woodgate*, Ry. & M. 193; *Hartley* v. *Hitchcock*, 1 Stark. N. P. C. 408.┼

(*t*) Cowp. 251; 3 B. & P. 449.

(16) ┼ 16 Ves. 280. *Walker* v. *Birch*, 6 T. R. 258; *Boardman* v. *Sill*, 1 Campb. 410, n.; *Owenson* v. *Morse*, 7 T. R. 64.┼

war, received orders from a neutral foreigner to effect insurance upon a ship, the property of the latter. *Jennings* employed his usual broker to get the policy done in his own name, but informed him that the interest was *neutral*. The broker, having received the amount of the loss upon the policy, refused to pay it over to the owner of the ship, insisting upon a right to retain for a demand which he had upon *Jennings*. A verdict was found for the plaintiff, the owner deducting only the premiums upon that particular policy; for Lord Kenyon was of opinion, that the information conveyed by *Jennings* to the broker that the interest was *neutral*, was a sufficient indication that he was only acting as agent for another, though the principal name was not then disclosed; and consequently that the defendant, the broker, had no lien upon the policy as against the plaintiff for his general balance against *Jennings*. And this direction was confirmed by the Court of King's Bench, on a motion for a new trial.(*u*)

‡ And upon the same principle it was decided in another case, where an insurance broker had employed a sub-agent to effect policies, informing him at the time that they were for a correspondent in the country; that the sub-agent had not, as against the principal, a lien on the policies for the general balance due to him from the broker,

(*u*) *Maans* v. *Henderson*, 1 East, 335.

but a particular lien only for the premiums and commission. (17) ↓

The rule, however, is subject to the qualification explained in the following case. *Heath*, a merchant at Jamaica, ordered his correspondents in England, *Atherton* and *Ashley*, to insure certain goods shipped by him for Liverpool. They accordingly directed their brokers, *Shifner & Co.* the defendants, to procure insurance on *Heath*'s account. *Atherton* and *Ashley* were creditors of *Heath*, and debtors of *Shifner & Co.* The policy remaining in the hands of the brokers, and the loss having been received by them, they insisted upon a right to retain, on the ground that *Atherton* and *Ashley*, who were indebted to them, had a lien against *Heath*. Judgment was given for the defendants; and the Court declared, that "their opinion was not founded upon any right which the defendants had to retain the policy, on the ground of having a lien on it to satisfy their claim on *Atherton* and *Ashley*; but considering them as the servants of *Atherton* and *Ashley*, who were entitled to hold the policy until their claim on *Heath* was satisfied, on the score of their general balance. (*w*)

↓ But beyond the general balance due from the principal to the factor, a sub-agent has no

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(17) [*Snook* v. *Davidson*, 2 Campb. 218; and see also *Lanyon* v. *Blanchard*, 2 Campb. 597.]

(*w*) *Mann* v. *Shifner*, 2 East, 523, 529, ante, (*r*).

right of lien against the principal, even for freight, duties, and other charges paid by him, as appears from the following case:—The plaintiffs, foreign merchants, consigned timber to their factors at Liverpool; and they, being unable to make the necessary advances on the consignment, procured the defendants to take upon them the charges, on agreement that they should be allowed one-half the commission. The defendants accordingly paid the freight, duties, &c. and took possession of the timber. The factors became bankrupt, having previously informed the defendants to whom the timber belonged; but the defendants nevertheless sold it, and claimed to retain the proceeds for their charges. The Court, however, were of opinion, on an action brought by the owners, that there was no such right as against them, there being no *privity* between them and the defendants.(18) ⸸

[And insurance brokers who have effected a policy *without notice* that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, and have a right to apply to the satisfaction of that balance, money received upon the

(18) ⸸ *Solly* v. *Rathbone*, 2 M. & S. 298; and see *Schmaling* v. *Tomlinson*, ante; *Jackson* v. *Clarke*, 1 Y. & J. 216; and see post, as to pledging by factors. ⸸

policy, as well *after* as *before* notice, that it belongs to a third person.(19)]

9. The cases hitherto supposed, in which agents may justify the detention of property in their hands, are founded upon their own rights. If an agent, however, be placed in the character of a mere stakeholder, and asserts no interest in the property, but cannot, on account of conflicting claims, safely give it up, he may, under particular circumstances, be protected in the detention of it. Thus, a banker, to whom property to a large amount had been entrusted for safe custody, declined to restore it to the owner in prison, under an apprehension, that if the latter remained in confinement two months, and should be thereupon made a bankrupt, he might himself be called upon by the assignees, and obliged to pay the amount over again. Upon this refusal, he was arrested in an action of trover; and upon his application to the Court of Chancery, to be relieved on bringing the amount into Court, relief was granted.(*x*) And perhaps, under circumstances of a similar kind, the Court in which the action is brought might think fit to stay the proceedings, upon bringing the money into Court, if the claims were in a course to be determined by

(19) [*Mann* v. *Forrester*, 4 Camp. 60; *Westwood* v. *Bell*, ib. 349, S. P.] ┼ *Bell* v. *Jutting*, 1 Moore, 155.┼

(*x*) *Langston* v. *Boylston*, 2 Ves. Jun. 101.

other means; or at least might discharge the defendant on common bail.(y) (20)

‡ If injury be sustained by the agent in consequence of a deception practised upon him by his principal, there he will of course have a right to compensation. For instance, if goods be sold by an agent under a false representation of their quality, and he be called upon to answer for the fraud, he may seek and obtain redress from his principal, if he were innocently drawn into the fraud by his misrepresentation.(21) ‡

[But the rule laid down in *Merryweather* v. *Nixon*,(22) that there is no contribution among joint wrong-doers, will sometimes affect the right of an agent, and prevent his recovering from his principal a compensation for an injury which he may have sustained by reason of a tort committed at his request. Thus if an agent, at the request of his principal, engage in the commission of an act which at the time is known to be a trespass, even an express promise of indemnity would not be binding upon the principal. And although, at the time the act is committed, it were not known

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(y) Id. ib. *Edwards* v. *Minett*, 1 Taunt. 166. See also *Field* v. *Todd*, 2 Ves. Jun. 106.

(20) ‡ The inconvenience of such a case would now be obviated by the statute 1 & 2 Wm. IV. c. 58, cited ante, p. 81, (6). ‡

(21) [*Southern* v. *How*, Bridgman, 126; 2 Moll. 330; Cro. Jac. 468.]

(22) [8 T. R. 186.]

to be a trespass, yet, if it eventually turn out to be so, a promise of indemnity will not be implied; neither, in such case, is there any ground for contribution, if the whole damages recovered for the trespass are levied against the agent. (23) So an express promise to indemnify a person against that which, from the nature of his office, he must be taken to have been conscious was against law, is void. (24)] ⸸ And generally, as has been already observed, no person can recover in respect of any unlawful transaction in which he has been knowingly engaged. (25) ⸸

(23) [*Farebrother* v. *Ansley*, 1 Campb. 343.]
(24) [*Martyn* v. *Blithman*, Yelv. 197.]
(25) ⸸ Ante, p. 64. ⸸

CHAPTER III.

THE OBLIGATION OF PRINCIPALS TOWARDS THIRD PERSONS FROM THE ACTS OF THEIR AGENTS.

1. Of the Authority,
   - Express,
   - Implied.
2. Of the Execution of the Authority as to the
   - Person,
   - Time,
   - Manner,
   - Form, &c.
3. Determination of Authority.
4. Extent of,
   General and Special Authority.
5. Power of Agent in the Disposition of Goods,
   - Sale,
   - Pledge, &c.
6. Principal, how Discharged.
7. Effect of an Authority in general as to the Power of Contracting.
   - Notice to Agent,
   - Delivery to,
   - Payment to,
   - Admissions of, &c.

8. Liability of Principals for Frauds, &c. of Agents.
9. Evidence in Actions against Principals founded on Contracts, or Acts of Agents.

PART I.

THE authority of an agent is either *express* or *implied*. An express authority is either in writing or by parol. It may be proper to consider, first, in what cases an authority must be in writing.

SECTION 1.

Where the Authority must be in Writing.

1. The form requisite for the due appointment of an agent depends upon the condition of the party represented, or the nature of the service to be performed. In the following cases the substitution must be by deed; viz. Where the appointment is by a corporation aggregate.(*a*) Unless it be for ordinary and inferior purposes, as a common servant, &c.;(*b*) or to such acts as are in the ordinary course of its business as such corporation. The Bank of England therefore, or any similar corporation, may, without deed, empower

(*a*) 9 Edw. IV. pl. 59; Bro. Corp. 24, 34; 1 Roll. Abr. 514.
(*b*) Plow. 91; Vin. Ab. Corp. K.

persons, as the servants of the corporation, to make and sign in the name of the corporation bank-notes, bills of exchange, &c.(1)↓ A receiver may be appointed without deed.(c) An assignment of auditors without deed is good.(d) A corporation may appoint a bailiff to distrain without deed or warrant,(e) for it neither vests nor devests any sort of interest in or out of the corporation.(f) But in order to authorize an agent to seize forfeited goods on behalf of a corporation aggregate, his appointment must be under the common seal, and must be so pleaded in a justification by the agent himself.(g) But if the corporation itself justifies, or where it is alleged that the corporation entered, it is not necessary to state a deed, that being intended.(h)

A corporation may appoint an attorney upon record without the common seal.(i)

Formerly an authority by a corporation to prove debts under a commission of bankruptcy must have been under seal, and produced at the

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(1) ↓ *Rex* v. *Bigg*; 3 P. Wms. 419.↓

(c) Per Townsend, J. Bro. Corp. 47; but Brian, J. contrà, that a corporation aggregate can do nothing without deed.

(d) Per Littleton, Bro. Corp. 48.

(e) 3 Lev. 127, but not in assize. Plow. 91, nor to enter for a condition broken. 1 Roll. Abr. 514; Bro. Corp. 59.

(f) Salk. 191.

(g) 2 Keb. 567, 604; 1 Mod. 18.

(h) 2 Saund. 305: Cro. Car. 169.

(i) *Mayor of Thetford's case*, per Holt, 1 Salk. 192.

time of proof.(*k*) ┼ But now, by the 46th section of the new Bankrupt Act, corporations and public companies may prove by an agent, however appointed, the only proof of authority required being the personal oath of the agent before the commissioners.

No person, however, can vote in the choice of assignees as the agent either of an individual or a corporate body, unless appointed by letter of attorney.(2)┼

2. An authority by deed is necessary in order to bind the principal under seal. This was admitted in a case where it was determined that even a partner, though the articles of partnership were under seal, is not empowered to bind his co-partners by deed without an authority of as high a nature.(*l*) And in an action of covenant on a charter-party, it appearing that the deed was executed by G. D. "for and on behalf of the defendants," but that G. D. had only a verbal authority from the defendants to execute the authority, Lord Kenyon held that the action could not be maintained: for that a deed could not be executed by an agent, so as to bind the principal, unless he were authorized by deed

(*k*) Co. B. L. 124, ed. 1799.

(2) ┼ Sect. 61. ┼

(*l*) *Harrison* v. *Jackson*, 7 T. R. 209. (*Elliott* v. *Davis*, 2 Bos. & Pul. 338.)

under seal.(m) It may be found laid down as a general rule, that a delegation of authority to do any act must be by deed; but the rule so stated does not seem warranted either by the authorities, or by usage.(n)

↓ By the same rule it was decided, that a general authority, from one of several assignees of a bankrupt's estate, to the others, to act for him and use his name, was not sufficient to enable the others to execute a release by *deed*;(3) and in another case, that an action could not be maintained by the principal upon a covenant in an indenture executed on his behalf by an agent appointed by writing, but not under seal.(4) ↓

[And though the principal acknowledge that he gave the agent authority, yet the acknowledgment itself is not sufficient to prove it, without the production of an authority under seal.(5)]

3. For the purposes described in the 1st, 2d, and 3d sections of the Statute of Frauds, that is for the purpose of *making* or *creating* leases,

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(m) *Horsley* v. *Rush and Tolson*, Guildhall sittings after Mich. Term, 1788, cited 7 T. R. 209; and see 6 T. R. 177. So an authority to take or receive livery of seisin must be by deed. 2 Roll. Abr. (R) pl. 3, 4.

(n) Bac. Ab. tit. *Authority*, A. cites Co. Lit. 48, 6; 2 Roll. Abr. 8; Salk. 96.

(3) [*Williams* v. *Walsby*, 4 Esp. N. P. C. 220.]

(4) ↓ *Berkeley* v. *Hardy*, 5 B. & C. 355. ↓

(5) [*Steiglitz* v. *Egginton*, 1 Holt, N. P. C. 141.]

estates, interests of freehold, or terms for years, or any uncertain interest, other than leases under three years, in messuages, manors, lands, tenements, or hereditaments, by an agent, or for surrendering the same, (except copyhold interests,) the authority of the agent must, by the express words of the statute, be in writing.(o) But for the purposes described by the fourth section, viz. "to charge executors or administrators out of their own estates; or to charge any for the debt or default of another; or upon an agreement in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement not to be performed within a year;" although the several agreements recited must be in writing, signed by the party or his agent thereunto by him lawfully authorized, the *authority* is not required to be in writing. And therefore the authority to contract for a lease or other interest in land need not be in writing, though the authority to sign the lease or instrument, by which the interest passes, must be so.(p) And purchases of land, &c. may be made, and commonly are made, by agents not appointed by writing, as by an auctioneer, who, both at law and in equity, is

(o) 29 Car. II. c. 3, s. 1. 2, 3.

(p) 5 Vin. Ab. 524; 9 Ves. 250; 10 Ves. 311. (*Clinan* v. *Cooke*, 1 Sch. & Lef. 22, S. P.)

considered as the common agent of the vendor and purchaser.(6) ⊥ Neither does the 17th section, relating to the sale of goods above 10*l.* which requires a note or memorandum in writing, signed by the parties to be charged,' or their agents thereunto lawfully authorized, make it necessary that the authority should be in writing.(*q*) (7)

An authority to ⊥ accept, draw, or ⊥ indorse a bill of exchange in another person's name may be

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(6) ⊥ *Emmerson* v. *Heelis*, 2 Taunt. 28; *Fairbrother* v. *Prattent*, 1 Dan. 67; *Kemeys* v. *Proctor*, 1 Jac. & W. 350. And see 3 Burr. 1921; 7 East, 567; 1 Campb. 513; 4 Taunt. 209. Post, Ch. III. p. 4, s. 3. ⊥

(*q*) 29 Car. II. c. 3, s. 17; and see post.

(7) ⊥ For the purposes of the 4th and 17th sections, so far at least as they relate to the sale of goods, any person who may fairly be considered as acting for the party in the transaction will sufficiently fill the character of an agent. Thus the memorandum of the broker, and the signature of an auctioneer to the catalogue of sale, are sufficient to make a contract binding; the broker and auctioneer being looked upon as agents lawfully authorized by both parties, and therefore of course by the party to be charged. 15 East, 107; 2 Campb. 337; 1 Stark. 128; 6 B. & C. 117; and the cases cited supra. The agent must, however, be some third person. One of the contracting parties cannot constitute himself agent for the other, even with his consent and approbation. And therefore in *Wright* v. *Dannah*, 2 Campb. 203, where the seller wrote the note by the direction and at the dictation of the buyer, it was held insufficient to charge him. And on the same principle, in *Farebrother* v. *Simmons*, 5 B. & A. 33, an auctioneer, who had made an entry of the purchase, was not considered to be an agent of the purchaser, so as to satisfy the statute, where the action for the breach of contract was brought *in his own name*. And see *Rayner* v. *Linthorn*, 1 R. & M. 325; *Cooper* v. *Smith*, 15 East, 103. ⊥

by parol:(r) and the statute 3 and 4 Anne, c. 9, which makes promissory notes assignable, speaks of such as 'are made and signed by any person, body politic' or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, *who is usually entrusted by him*, her, or them, to sign such promissory notes; from which it may be inferred that the legislature looked rather to the fact of employment, than to the manner in which the authority was constituted.

In commercial affairs agents are most usually commissioned by a letter of orders, or simply by a retainer.

Section 2.

Implied Authority.

1. An authority, however, may not only be expressly created by the modes above mentioned, but may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. As the law of master and servant is the basis of this branch of the law of agency, it may be proper to refer to that source for authorities. And though employment be [is] sometimes considered only as evidence of an

(r) Per Holt, C. J. 12 Mod. 564.

authority, it may, perhaps, be properly regarded as the authority itself; upon a general principle of justice, that he who accredits another by employing him, must abide by the effect of that credit. Thus, if a servant have been allowed by his master to buy upon credit, the latter is answerable for what is bought by that servant, though without his authority. The rule is thus laid down by Lord C. J. Holt: (a) "If a man send his servant *with ready money* to buy goods, and the servant buy upon credit, the master is not chargeable. But if the servant usually buy for the master upon tick, (1) and the servant buy some things without the master's order, yet if the master were trusted by the trader, he is liable." (b) So if a servant, usually employed to pledge goods or borrow money, pledge his master's goods for money, the lender may maintain an action of debt for it against the master. (c) *One instance* in which the servant's authority to buy upon credit was recognized, was held sufficient to charge the master, as follows: the defendant, who was a dealer in iron, and known by the plaintiff to be so, though they never before had any dealings together, sent a waterman to

(a) Show, 95.

(1) ‡ Assuming of course that the master has authorized or adopted such a course of dealing. ‡

(b) See also 3 Keb. 625; 10 Mod. 111.

(c) 12 Mod. 564.

the plaintiff for iron on trust, and paid for it afterwards. He sent the same man again with ready money, who received the goods, but did not pay for them; and it was ruled that the sending him upon trust the first time was giving him credit, so as to charge the defendant upon a second contract. (*d*) (2)

So a bill or note drawn by a clerk, who is allowed to issue notes, will bind the master, though the money never come to his use. (*e*) (3)

(*d*) *Hazard* v. *Treadwell*, 1 Str. 506.

(2) ↓ See *Todd* v. *Robinson*, Ry. & M. 217; *Gilman* v. *Robinson*, ib. 226. In both these cases, however, there had been frequent dealings on credit through the agent, expressly recognized by the principal, and in the latter case Best, C. J. seems to have doubted whether a single instance of recognition by payment would suffice. The question would be, whether from such a recognition a tradesman would be justified in inferring a *general* authority from the principal to the agent to deal for him on credit in respect of the same description of goods, and a jury would be very likely to say, that he was so justified, and that if loss occurred, it ought to fall on the employer for having induced him to suppose the existence of such an authority. ↓

(*e*) *Boulton* v. *Arlsden*, 1 Salk. 234. In this manner the acts of the wife, supported by evidence of the husband's assent to other acts of the same nature, and in the same business, may bind him. Thus a wife, in the absence of, and unknown to her husband, contracted for the board of his daughter, aged seventeen, who, after some time, was removed by her to another situation. In an action by the person with whom she was last placed, it was proved that the husband had paid for the first board, though he expressed some disapprobation of it; and it was held, that he had thereby so far acknowledged the discretionary power to contract for this purpose, as to make him liable

But without any previous dealing upon credit sanctioned by the master, a party who trusts a servant does it at his own peril, and can only resort to the servant's responsibility, and the master is only liable for so much as comes to his use; (*f*) and not even for that, if he gave the servant money beforehand to pay for it. (*g*) A rule laid down by Lord Kenyon is, that where a man gives his servant money to pay for commodities as he buys them, if the servant appropriate that money, the master will not be liable; but if the

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to the plaintiff upon the second contract. *Forsyth* v. *Milne*, Sittings after M. T. 1808, Gd. Hall, B. R.

[So where the wife alone transacted the husband's business, and purchased all the articles used in his trade, her admission, as to the state of the accounts between the person who has supplied goods to her to be used in the trade, and her husband, was held to be evidence against the latter. *Anderson* v. *Sanderson*, 2 Stark. N. P. C. 201.] ⸸ And see 1 Campb. 121; 3 B. & C. 631. ⸸

(3) ⸸ And so it is in the case of partners, the rights and liabilities of whom are governed by the same rules as are the relations of principal and agent, each partner being considered, in all which relates to partnership business, the agent of the rest. The same questions, therefore, of express and implied, general and special authority, are continually arising among them, and must be determined on the same principles as those which are here laid down. Indeed the law of partnership is but a branch of that of principal and agent, and might have been fitly introduced into this treatise; but as it did not enter into the design of the original author, it has been thought better merely to refer to it generally. ⸸

(*f*) *Pearce* v. *Rogers*, 3 Esp. Cas. 214; and see 4 Esp. 174.

(*g*) 1 Salk. 234. See next page.

master employ the servant to buy things upon credit, he will be liable to whatever extent the servant pledges his credit. And in the case then in question, where the mode of dealing was for the master to give money to pay for the articles, as bought, to the servant, who used to pay it over whenever it amounted to a certain small sum, it was held that the tradesman, having suffered the account to run to a considerable arrear, could not recover against the master; for that by departing from the usual mode of dealing, he had trusted the servant and not the master.(*h*)

But the fact of articles purchased having come to the use of the master is *primâ facie* sufficient to make him liable, and he can only discharge himself either by showing, as in the instance just mentioned, that the credit was really given to the servant, or that he always gave the servant ready money to pay for the articles bought, and had not, therefore, authorized him to buy upon

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(*h*) *Stubbing* v. *Heintz*, Peake, Ni. Pri. 48. A rule somewhat different is stated in another case, where it is said to have been resolved by Holt, C. J. that where the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys upon tick, yet the master is liable, so as the goods come to his use, otherwise not. *Boulton* v. *Arlsden*, 3 Salk. 234. However, the report of the same case, 1 Lord Raym. 225, does not support this statement; and is consistent with the rule as mentioned in the text. It is indeed there said to have been so adjudged in *Stowell's case*, but that Holt, C. J. doubted that resolution.

credit. But the latter ground is an excuse only in cases where the master gives the servant money to go to market with. For if he have assented to his dealing upon credit at all, he will be liable for his contracts, notwithstanding he may afterwards furnish money to the servant, which the latter neglects to pay over. In *Sir Robert Weyland's case,* he gave his servant money every Saturday to discharge the expenses of the week; the servant did not pay the money due for several weeks together, though he received it regularly each week, and the seller recovered.(*i*) The principle of that case is recognized in the following, which affords a clear rule upon this subject. The action was for the price of hay and straw sold by the plaintiff for the use of the defendant's horses. The delivery at the defendant's of the articles, and also of bills of parcels, was proved; but the plaintiff never saw the defendant, nor received any orders or payments directly from him. The defendant's manner was to keep a book with the servant (his coachman) by whom the goods were ordered, in which the articles procured by, and the sums advanced to him, were entered; but the advances were not specifically for the articles bought, but made generally from time to time. Lord Ellenborough, "If the goods were taken up, and the money

(*i*) *Sir Robert Weyland's case,* 3 Salk. 234: 1 Ld. Raym. 225.

given afterwards to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money, for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant were not so in cash, he gave him a right to take up the goods on credit; and I think he will be liable, as the servant has not paid the plaintiff, though he may have received the money from the defendant his master." And there was a verdict accordingly for the plaintiff.(*k*)

⊥ The same rules which have been here laid down as to the authority of a servant, will be found equally applicable to that of an agent. Thus, a broker employed to purchase has no authority, as broker merely, to sell for his principal. But if the principal has allowed him to clothe himself with the apparent ownership, or has given him the power of disposition, he cannot afterwards reclaim the goods from a third person, to whom the broker has made an unauthorized sale of them. Accordingly where the principal had himself transferred hemp in the wharfinger's book into the name of the broker through whom

(*k*) *Rusby* v. *Scarlett*, 5 Esp. Cas. 76.

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(k) *Rusby* v. *Scarlett*, 5 Esp. Cas. 76.

he had bought, and whose ordinary business it was to buy and sell hemp; it was held, that he could not recover it back from the person to whom the broker had sold it. "It cannot fairly be questioned," said Lord Ellenborough, "in this case but that Swallow [the broker] had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale." "When the commodity is sent in such a way and to such a place as to exhibit an apparent

purpose of sale, the principal will be bound and the purchaser safe."(4)

Whether the circumstances are sufficient to warrant the inference of such an authority, it is the province of the jury to decide.(5)⸸

A master may also be liable on a note given by his clerk or servant, though without authority, if the money be actually and *bonâ fide* applied to his use.(*l*) (6)

⸸ An authority to draw, accept, or indorse bills, may also be presumed from acts of recognition in former instances. And, therefore, where the person whose name appeared on the bill as acceptor refused to pay, on the ground that the acceptance was a forgery, it was held, that proof of payments by him on other occasions in respect of acceptances given by the same party in his name, was a sufficient answer to the defence.(7)

(4) ⸸ *Pickering* v. *Busk*, 15 East, 38; and see *Townsend* v. *Inglis*, Holt's N. P. C. 278; and *Whitehead* v. *Tuckett*, 15 East, 400, post. ⸸

(5) ⸸ *Dyer* v. *Pearson*, 3 B. & C. 38. ⸸

(*l*) 1 Ld. Raym. 225; but see *Kilgour* v. *Finlayson*, 1 H. B. 156.

(6) ⸸ This proposition was certainly laid down by Holt, C. J. but surely much too broadly—at least, the master's knowledge of the appropriation should be shown, and even then it is more than doubtful whether an authority to sign a note (not being in the ordinary course of the employment of the clerk or servant) could be inferred from that circumstance alone. ⸸

(7) ⸸ *Barber* v. *Gingell*, 3 Esp. N. P. C. 60; and see *Haughton* v. *Ewbank*, 4 Campb. 188. ⸸

And in one case Lord Ellenborough held the defendant bound by a *guarantee* signed by his son, a minor of sixteen, on proof that he had occasionally signed his father's name, and accepted bills for him.(8) It may be doubtful, however, whether in this last case some further evidence of authority should not have been given.⸸

2. The implied authority arising from employment continues after the agency has ceased, unless the parties giving credit to it either may be supposed to have had notice of the change, or from length of time or other circumstances ought not to have inferred that it continued. A servant had power to draw bills in his master's name, and was afterwards turned out of his service; and it was ruled, "that if he draw a bill in so little a time that the world cannot take notice of his being out of service; or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it; the bill in those cases shall bind the master."(*m*) Thus, also, a servant of Sir Robert Clayton, who had been used to receive and pay money, took up two hundred guineas after he had quitted the service; and the lender recovered against Sir R. Clayton, by the direction of Keeling, C. J. which was ap-

(8) ⸸ *Watkins* v. *Vince*, 2 Stark. 368. ⸸

(*m*) 12 Mod. 346; —— v. *Harrison*, Moll. 107.

proved by the whole Court on a motion for a new trial. (*n*) (9)

3. As an authority may be presumed from previous employment in similar acts, so the same presumption arises from subsequent acts of assent or acquiescence; (*o*) and a small matter will be evidence of such assent. (*p*) And if with a know-

(*n*) Moll. 282; 10 Mod. 111.

(9) ╡ It is suggested, therefore, by Mr. Chitty in his Treatise on Bills, that in the case of a mercantile agent it will be prudent to give notice in the Gazette and by circulars of the determination of his employment. ╡

(*o*) *Ward* v. *Evans*, Salk. 442; Comb. 450; 2 Ld. Raym. 930.

(*p*) Ib. and *Thorald* v. *Smith*, 11 Mod. 88; *Ward* v. *Evans*, 6 Mod. 37; *Kinnitz* v. *Surry*, Guildhall Sittings after Mich. T. 1805, B. R. Assumpsit for not receiving corn sold. By the course of the corn market the *seller*'s broker delivers a sample and order for the delivery of the corn to the buyer, who has till next market-day to refuse it, if he find the bulk vary from the sample. The buyer having had the corn examined, refused the contract. One objection in point of law was, that there was no memorandum of the contract signed by the buyer or his agent. Lord Ellenborough declared himself clearly of opinion, that the broker's note was not sufficient of itself, he being *primâ facie* only the agent of the seller, and not of the buyer; but if the buyer *acted* upon the order, as in this case he appeared to have done, by sending his servant to examine the bulk upon the authority of the broker's order, that was such an adoption of the broker's agency as made him agent for both parties, and his note sufficient within the Statute of Frauds. ╡ *Maclean* v. *Dunn*, 4 Bingh. 722. And therefore although in general an agent cannot depute another to sign a contract, yet the principal may render himself liable by confirming the act of the sub-agent. *Blore* v. *Sutton*, 3 Meriv. 246; *Soames* v. *Spencer*, 1 D. & R. 32; *Henderson* v. *Barnwall*, 1 Y. & J. 387. ╡

ledge of all the circumstances, an employer adopts the acts of his agent for a moment, he is bound by them.(*q*) A promise alone to pay a bill indorsed by an agent would not support an action, if the indorsement were contrary to authority; yet if the authority be doubtful, such a promise is decisive.(*r*)

An executrix having authorised a person by letter of attorney to do acts relative to the administration in her name as executrix, he accepted a bill by which she was made personally liable; and though great doubt was entertained whether the executrix was bound by the acceptance, yet *her admission* that it was for a just debt and ought to be paid, was held sufficient evidence of a special authority, without reference to the letter of attorney.(*s*)

An adoption of the agency in one part operates as an adoption of the whole act; for an act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder.(*t*) Thus an agent had been secretly employed on behalf of a bankrupt after his bankruptcy to lay out money in India bonds. The assignees, upon discovering the fact, seized some of the bonds remaining in the agent's hands, and accepted them as part of the

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(*q*) Per Buller, J. 2 T. R. 189, *in notis*.
(*r*) *Fenn* v. *Harrison*, 4 T. R. 177.
(*s*) *Howard* v. *Baillie*, 2 H. Bl. 618. ‡ See Sec. 3, note (5).‡
(*t*) 2 Str. 859.

estate; and afterwards brought an action against him for the money with which the other bonds were purchased. The Court was very clearly of opinion that the acceptance of some of the bonds was an affirmance of the agent's act in laying out the money, and that the assignees could not avow one part of the transaction and disavow another.(*u*) This decision was referred to, and its principle adopted by Lord Hardwicke, on a bill filed for relief against a verdict obtained by the assignees of a bankrupt, who, after his bankruptcy, had paid 3000*l.* to the petitioner, and to whom the petitioner in the course of the same dealings had paid 712*l.* The bill sought to have an allowance of the latter sum, which was decreed by the Lord Chancellor, upon the principle that the assignees, to support the action of assumpsit, had considered the bankrupt as their factor, and that they must therefore take him as their factor in all acts done fairly and without deceit.(*w*) (10)

(*u*) *Wilson* v. *Poulter*, 2 Str. 859; 1 Barnard. 77, 118, 136, 142, 284.

(*w*) *Billon* v. *Hyde*, 1 Atk. 128. So in *Smith* v. *Hodgson* a bankrupt, on the eve of his bankruptcy, sold goods to a creditor with a view to a fraudulent preference; but the assignees having brought an action of assumpsit for goods sold and delivered, the form of the action was held to be an affirmance of the contract of sale, so as to entitle the creditor to set off his debt. 4 T. R. 211, and Bull. N. P. 131. It is said to be ruled by Parker, C. J. that in the case of money paid by a bankrupt after an act of bankruptcy (though for a valuable consideration) the action *must* be trover, for you cannot confirm the act in part and impeach it as

Thus also a broker, after the bankruptcy of his principal, gave his own acceptances, which were afterwards paid by him to the defendants, who were holders of certain valuable securities belonging to the principal, to induce them to part with those securities; and having afterwards recovered the money due thereon, deducted out of it the

to the rest. (11) But where a master of a ship, which was wrecked in a foreign port, sold the cargo and remitted the proceeds to the owners of the ship, and the owner of the cargo brought an action for money had and received to his use, it was contended that by this form of action the plaintiff had affirmed the master's act in selling the goods, and that consequently the owners had a right to retain for the freight *pro ratâ*, for the sale so affirmed had dispensed with the prosecution of the voyage. But it was held, that the plaintiff might recover without any deduction for freight, and that the only effect of this form of action was to waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money, and to confine the plaintiff's right to recover to the net proceeds of the sale. *Hunter* v. *Prinsep*, 10 East, 378, 394.

(10) ╂ That an act cannot be adopted in part and rejected in part is a general rule applicable to other cases besides this of principal and agent. Thus in *Ferguson* v. *Carrington*, 9 B. & C. 59; Dan. & Lloyd, 198, to an action brought by the seller against the buyer for the price of goods, it was set up as a defence that credit had been given, the term of which had not expired when the action was commenced; and when the seller would have replied that the purchase was altogether a fraud and null, Lord Tenterden would not admit such an answer, on the ground, that, by bringing an action for the price, he had himself ratified and affirmed the transaction. ╂

(11) ╂ It is, however, quite clear that the assignees may adopt the payment, treating it as money had and received by the person to whom the payment was made to the use of the assignees. ╂

amount of his own acceptances. The assignees sought to recover this sum from the defendants; but it was said by Lord Ellenborough, that the assignees having adopted the broker as their agent for the recovery of the money due upon the securities, they must adopt him throughout, and take his agency *cum onere;* and judgment was given for the defendants. (*x*)

SECTION 3.

Execution of Authority.

The next consideration which occurs as affecting the liability of the principal is the due execution of the delegated authority. And in pursuing this inquiry it will be necessary to examine, 1st. By whom the authority must be executed; 2d. In what manner; 3d. In what time: under the last of which heads it will be proper to touch upon the means by which an authority is determined or countermanded.

1. A delegated authority can be executed only by the person to whom it is given; for the confidence being personal, cannot be assigned to a stranger. (*a*) Therefore, if an agent be appointed to sell, he cannot depute the power to a clerk or

(*x*) *Hovil* v. *Pack*, 7 East, 164, 166.

(*a*) Roll. Ab. 330; 9 Co. 77 b; 2 Roll. Ab. 9.

under-agent, notwithstanding any usage of trade, unless by express assent of the principal.(*b*) (1) In the case of *Coles* v. *Trecothick*, the defendant had retained a person named Smith, an auctioneer, to sell his estate. During the absence of Smith the estate was sold by one of his clerks; but it appeared in evidence that previous to Smith's departure, in consequence of the seller's inquiry whether any delay would be incurred by his absence, the latter was told by him that he was in the habit of allowing his clerks to sign contracts, witness instruments, and conduct his business. Upon a bill for performance of the contract, Lord Eldon reprobated the doctrine that if an auctioneer is authorized to sell, all his clerks are, during his absence in consequence of any usage in that business, agents for the party who authorized him. But his lordship thought the evidence of the seller's assent to the sale by the clerk was sufficiently express to bind him. (*c*)

(*b*) *Coles* v. *Trecothick*, 9 Ves. Jun. 236, 251, 252.

(1) [In the case of *Blore* v. *Sutton and others*, 3 Merivale, 237, it was decided by the late Master of the Rolls, that an agreement for a lease, evidenced only by a memorandum in writing, entered in the book of A.'s authorized agent, signed not by the agent himself, but by his clerk, was not a sufficient agreement in writing, it not being signed by an agent properly authorized, notwithstanding the entry was shown in evidence to have been approved by, and to have been made under the immediate direction of the authorized agent, and in the usual course of business in his office.] ┴ And see *Henderson* v. *Barnwall*, 1 Y. & J. 387.┴

(*c*) *Coles* v *Trecothick*, 9 Ves. Jun. 236, 251, 252; ┴ and see *Blore* v. *Sutton*, supra, and *Mason* v. *Joseph*, 1 Smith, 406.┴

‡ And so, as has been seen, a factor cannot delegate his employment to another, so as to raise a privity between that other and his principal, or consequently to confer upon the person deputed as against the principal any right, whether of commission, repayment, or lien.(2) Neither can one, specially entrusted to sell, relieve himself from accounting to his principal by devolving the trust upon another, though he have acted *bonâ fide* for the interest of the principal.(3) ‡

An authority given to two cannot be executed by one,(*d*) though one die or refuse.(*e*) If an authority be to A. B. and C. to sell after the death of D., and one die before D., the others cannot sell.(*f*) An authority to three *jointly* and *separately* is not well executed by *two*.(*g*)

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(2) ‡ *Solly* v. *Rathbone*, 2 M. & S. 299; ante, p. 150; *Cockran* v. *Irlam*, ib. 301; *Schmaling* v. *Tomlinson*, 6 Taunt. 147. ‡

(3) ‡ *Catlin* v. *Bell*, 4 Campb. 184. cited ante, p. 3, (*a*). ‡

(*d*) Co. Lit. 112 b, 181 b.

(*e*) Ib. and 1 Com. Dig. 144; 1 And. 145.

(*f*) Co. Lit. 112 b.

(*g*) Co. Lit. 181 b; 1 Roll. Ab. 329. But if there be a warrant to five bailiffs upon a *fi. fa. conjunctim et divisim*, execution by two or three will be well. 1 Roll. Ab. 329, l. 5; Com. Dig. tit. Attorney, c. 8. ‡ The rule is, that a naked authority must be construed and pursued strictly. The words jointly *and* severally and jointly *or* severally have therefore been construed as authorising all to act jointly, or each one to act separately, but as not authorising any portion of the number to do the act jointly. That this is a very technical and narrow construction is manifest, and one cannot but rejoice to see that the Court of

2. As to the *manner* in which an authority is to be executed.

Acts done by an agent within the scope of his authority, and in which his commission is punctually pursued, are of course binding upon the principal; but where the authority is particular, the party must pursue it; and if the act vary from it, he departs from his authority, and what he does is void; (*h*) unless the variance be merely circumstantial. (*i*) Thus an authority given by an executor to pay, discharge, and satisfy all debts due from the testator, and to do all acts for the principal as executor, does not empower the agent to charge the executor (4) by acceptances generally in his name, though for a debt due from the testator. (*k*) It should, however, be observed, that the decision upon this point is opposed by that of Lord Loughborough, given in a similar

King's Bench would not apply it to a case where it would have wrought manifest injustice, and defeated the intention of the party who gave the power. The case was this: A power of attorney was given to fifteen persons therein named *jointly or severally* to execute such policies as they, or any of them, should *jointly or severally* think proper. Four of the persons named executed the power by underwriting a policy; and the Court held the principal bound, upon the plain meaning of the power itself. *Guthrie* v. *Armstrong*, 5 B. & A. 628. ⸸

(*h*) Salk. 96.

(*i*) Ib. and Co. Lit. 49 b, 303 b.

(4) ⸸ More correctly thus: "to charge the acceptor *personally* by accepting a bill *per procurationem*, though, &c." ⸸

(*k*) *Gardiner* v. *Baillie*, 6 T. R. 591.

case, where, however, the judgment proceeded upon other grounds. (*l*) (5)

If it be to do an act upon condition, and the agent do it absolutely, it is void, and *vice versâ*. (*m*)

Regularly, says Lord Coke, if a man do less than the command or authority committed to him, there (the commandment or authority not being pursued) the act is void; but where a man doth that which he is authorised, and more, it is good for that which is warranted, and void for the rest. (*n*) But both these rules may have many exceptions and limitations.

(*l*) *Howard* v. *Baillie*, 2 H. Bl. 623.

(5) ✝ The case of *Howard* v. *Baillie* can hardly be supported in any view which can be taken of it. An *implied* authority cannot in general have place where there is an *express* authority in writing. The nature and extent of the authority must in that case be gathered from the written instrument alone. To be sure, if the principal directly adopt the act, it may then be considered as his act, and there will be no need to have recourse to the terms of the appointment. But in the case cited, the admission merely went to this: that the debt, in respect of which the acceptance was given, was a just debt, and ought to be paid; there was no recognition of an authority in the attorney either specially to accept bills, or generally to make the executrix personally liable. That the terms of the power did not warrant such an act will be seen on reading it as it is set out at length in the report of H. Bl. 624. See several cases of a like nature, post, Sec. 5, "on the *Extent* of the Authority," to which head this case is, perhaps, more properly referrible. ✝

(*m*) Co. Lit. 258 b.

(*n*) Ib. But where a man has an authority coupled with an interest, he may do less than his authority commands. 1 Com. Dig. 645. ✝ Where there is a complete execution of a power,

Whatever would be sufficient if done by the principal, is sufficient to be done by his representative, though the inability which excuses the principal from doing more, does not affect the agent. (*o*)

3. With regard to the *form* to be observed in the execution of an authority, it is an established rule, that an act done under power of attorney must be done in the name of the person who gives the power, and not in the attorney's name. It was resolved in *Combe's case*, (*p*) that when one has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person, and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority; and this maxim is recognised

and something, *ex abundanti*, added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad. See *Alexander* v. *Alexander*, 2 Ves. 644; Ib. note (202). To pursue this subject further would lead us into the difficult and abstruse learning of "Powers," for which the reader is referred to Sir E. Sugden's elaborate Treatise. It can have little place in mercantile questions, where the act done is for the most part indivisible.

(*o*) Co. Lit. 258 a.

(*p*) *D'Abridgcourt* v. *Ashley*, 9 Co. 76, 77; Moor, pl. 1106. Sir F. Walsingham, under a power of attorney from Sir P. Sidney, made a lease in his own name, and held bad.

in many subsequent instances.(q) And in a prior case it was decided, that where one had a power of attorney to release a debt, the release being in his own name, was void.(r) So the execution and delivery of a deed must be in the name of the principal, and if it be the execution of the agent only, it is void as to the principal; as where the King granted authority to one to make leases, a lease made by him in the King's name, but *executed* by himself, was held void, for the execution ought to have been with the King's seal, thus: "The King by A. B. puts his seal, &c."(s)

In the application of this rule, however, a difference is to be observed between a bare act, such as the surrender of a copyhold, the execution of a deed, &c. and the form of a contract. It is equally necessary in both that the thing should be done in the principal's name, but in the former it is sufficient if it be stated to be done *by the agent* for or in behalf of the principal; as in the case of a surrender of a copyhold estate by attorney, the entry being that W. and S., by virtue of a letter of attorney from T. C., surrendered, &c. it was held sufficient.(t) So if the execution of a deed really appear to be in the name of the principal, the form of words used in the execution is

(q) 1 Str. 705; 2 East, 142, post, p. 183, &c.
(r) *D'Abridgcourt* v. *Ashley*, Moor, 818.
(s) *Anon.* Moor, 70, pl. 191.
(t) *Parker* v. *Kett*, Salk. 95; 9 Co. 77.

not material; for in a late case, where the principle was recognised and affirmed, it was deemed sufficient that opposite the seal was written, "for S. B. (the principal), M. W. (the attorney)."(u) The most advisable way is, A. B. (the principal), by C. D. (the attorney), and this is certainly good.(w)

But though in these cases of mere ceremonial acts it is indifferent in what order the names stand, whether *the principal* by *the attorney*, or *the attorney* for *the principal*, yet in the *form of a contract* made by attorney the wording is material. Where an interest passes by the instrument, as in an indenture of lease, it must in terms be conveyed by the principal, in whom alone the interest is; for the power of attorney, as such, vests no interest in the representative, consequently none can pass from him, and therefore if a lease were made in the name of the attorney, though it were added also *by virtue of a letter of attorney*, or "by A. B. as attorney for C. D.," it would be a void lease.(x) A covenant for the

(u) *Wilks* v. *Bach*, 2 East, 142.

(w) Per Grose, J. 2 East, 144.

(x) Bac. Abr. tit. Leases, (s. 10). The distinction here stated upon the authority of Ch. B. Gilbert corresponds with what is found in *Combe's case*, 9 Co. 77. "If I, as attorney to I. S., deliver you seisin, or I, by force of a letter of attorney, deliver you seisin, that is well done; but if attornies have power, by writing, to make leases for years, &c. they cannot make indenture in their own names, but in the name of him who gives them warrant." And see 1 Roll. Abr. 330, 501; Godb. 389.

payment of rent, made between the covenantor on the one part, and the plaintiff, as attorney for T. F., on the other, in which the plaintiff for, and in the name, and as attorney for T. F., demised, &c. is void, for being void so as to pass an interest in the land, it is also void as to the reservation of rent.(*y*)

A bond reciting certain differences between the obligee and the obligor, *as attorney for T. F.*, was conditioned that the obligor should perform such award as the arbitrators therein named should make upon the premises. It was agreed that the submission in this form was not binding upon the principal, though it was resolved to be so upon the obligor.(*z*)

| In bills of exchange and other mercantile instruments drawn, accepted, or indorsed by agents, it is most material that the character of agent should be shown upon the instrument; not that the omission affects in any way the validity of the instrument, but because it renders the agent personally liable, and releases the principal. But of this more fully hereafter.(*b*) |

(*y*) *Frontin* v. *Small*, 2 Ld. Raym. 1418; 1 Str. 705.

(*z*) *Bacon* v. *Dubary*, 1 Ld. Raym, 246; Salk. 70; 12 Mod. 129.

(*b*) | Post, Chap. VI. Sec. 1. |

SECTION 4.

Determination of Authority.

It is further necessary to the validity of the execution, that it take place during the continuance of the authority; which leads us to consider, thirdly, The manner in which an authority is determined; which is either by revocation, or by efflux of time, or by performance of the commission.

A power of attorney or other authority is in general revocable from its nature; but there is this exception, viz. where a power of attorney is part of a security for money, there it is not revocable. As where a power of attorney was made to levy a fine as part of a security, it was held not to be revocable.(*a*) The principle is applicable to every case where the power is necessary to effectuate any security.(*b*)(1) Therefore where a man assigned all his effects in trust for the benefit of the trustee and his other creditors, and executed a power of attorney to the trustee to call in his debts for the purposes of that trust, it

(*a*) Per Lord Kenyon; *Walsh* v. *Whitcomb*, 2 Esp. Cas. 565.
(*b*) Id. ib.

(1) ⸸ It may be laid down as a general rule that an authority coupled with an interest is not, unless the power of revocation be expressly reserved, revocable by the party himself, or by his assignees. ⸸

was held to be part of the security for the payment of the creditors, and therefore not revocable.(c) So where a power of attorney is executed for a valuable consideration, a court of equity will not permit it to be revoked.(d)

⸸ The power of revoking an authority may be exercised at any moment before the actual exercise of it; and therefore, although a contract may have been entered into by a broker, his authority is still countermandable until the requisites for giving a legal validity to it have been fulfilled. Thus, where a broker had entered into a verbal agreement to sell goods, it was held that his authority might be determined at any moment before the signing of the written memorandum required by the Statute of Frauds;(2) and in like manner the authority of an insurance-broker was held to have been put an end to by the express dissent of the principal to the terms of the proposed insurance before the signing of the policy, although the broker had already signed the slip, which is deemed by mercantile courtesy obligatory on the parties.(3) ⸸

An authority conferred by letter of attorney must be executed during the life of the principal,

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(c) *Walsh* v. *Whitcomb*, 2 Esp. Cas. 565.

(d) *Bromley* v. *Holland*, 7 Ves. Jun. 28.

(2) ⸸ *Farmer* v. *Robinson*, 2 Campb. 339, (n). ⸸

(3) ⸸ *Warwick* v. *Slade*, 3 Campb. 127; and see *Bristow* v. *Taylor*, 2 Stark. N. P. C. 50. ⸸

for a power to represent another can only continue as long as there is some one to be represented.(e) Hence a letter of attorney to surrender a copyhold, &c. after the death of the principal, is void.(f) A payment of sailors' wages to a person having a power of attorney to receive them has been held void where the principal was dead at the time of the payment.(g) ⸸ And in another case, where a power was given coupled with an interest, namely, a power to a creditor to sell a share in a vessel, out of which he was to pay his own debt, it was held to be at once revoked by the death of the debtor who had given it. "A power coupled with an interest," said Lord Ellenborough, "cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?"(4) And the same point seems to have been determined in a case in equity, where a power to a creditor to receive a debt, expressly for the purpose of liquidating the claim of the creditor, unaccompanied, however, by any actual assignment of the debt, or by any security to which the power might have been ancillary, was held to be revoked by the death of the prin-

(e) 1 Bac. Ab. tit. Authority, E.; but this does not apply to authorities given by a corporation aggregate. Co. Lit. 52 b.

(f) Sty. 424; Co. Lit. 52 b.

(g) 5 Esp. Cas. 118.

(4) ⸸ *Watson* v. *King*, 4 Campb. 272. ⸸

cipal. (5) ⸸ But on a question whether a check given by a dying person to a relation, but not presented in his lifetime, could be enforced as *donatio causâ mortis* against the executor, it was said by Lord Loughborough, that if the donee had received the money upon the check immediately after the death of the testator, and before the banker was apprised of it, he was inclined to think no court would have taken it from him. (*h*)

⸸ An authority is also in general revoked by the bankruptcy of the principal. But if it be coupled with an interest, whether legal or equitable, then, as the assignees can take nothing to which the bankrupt had not a good title both at law and in equity, the right of the agent will not be affected by the bankruptcy. Neither, for the same reason, will the rights of third parties, derived from a power executed after the bankruptcy of the principal, be disturbed, unless the interests of the general creditors would be affected; upon which principal the following case was decided:—A bill of sale had been given of a vessel at sea. By the Registry Act this had the effect of transferring the absolute property in the ship, subject only to be devested in case no indorsement of the transfer were made on the certificate of registry within ten days after her arrival in port. A power was

(5) ⸸ *Lepard* v. *Vernon*, 2 V. & B. 51. ⸸
(*h*) *Tate* v. *Hilbert*, 2 Ves. Jun. 118.

given to A. to make this indorsement, and after the execution of the bill of sale and of this power the person who had made the transfer became bankrupt. A. nevertheless, after the bankruptcy, executed the power by making the indorsement; and the Court held, that the power was not revoked by the bankruptcy, the interest having passed by the bill of sale.(6) ⸸

It has been questioned with respect to an agent acting under a power of attorney, whether acts done by him before he knows of the revocation of his warrant, are good against the principal; and it seems that the principal in such case could not avoid the acts of his agent done *bonâ fide*, if they were to his disadvantage; though he might consent to avoid such as were for his benefit.(*i*)

In general the credit arising from ostensible employment continues, at least with regard to those who have been accustomed to deal upon the faith of that employment, until they have notice of its being at an end,(*k*) or till its termination is notorious.(*l*)

The authority of an agent for the purpose of sale is at an end by the sale, and therefore an auctioneer after the sale has no authority to treat

(6) ⸸ *Dixon* v. *Ewart*, 3 Meriv. 322; Buck, 94. ⸸
(*i*) Per Buller, J.; *Salt* v. *Field*, 5 T. R. 215.
(*k*) *Hazard* v. *Treadwell*, Str. 506; ante, 162.
(*l*) —— v. *Harrison*, 12 Mod. 346; ante.

of the terms upon which a title is to be made.(*m*) ⸸ And by usage in some trades, which the Courts have recognised as a lawful usage, the authority of a broker to sell expires with the day on which it is given, and as all parties dealing in that trade are presumed to be cognizant of the usage, the principal is not bound by a contract of the broker made after that day.(7) ⸸

Section 5.

Extent of Authority.

When a valid subsisting authority is established and regularly executed, the remaining inquiry is as to the legal effect of acts done under it.

1. An authority is to be so construed as to include all necessary or usual means of executing it with effect.(*a*) As an instance illustrative of this maxim, a general bailiff of a manor may make leases at will without any special authority; the reason assigned for which in the books is, because great prejudice and inconvenience would ensue to the lord by absence, sickness, or other incapacity, if he had not that power.(*b*) But he has no general power to make leases for

(*m*) *Seton* v. *Slade*, 7 Ves. Jun. 276.

(7) ⸸ *Dickinson* v. *Lilwall*, 4 Campb. 279. ⸸

(*a*) 2 H. Bl. 618.

(*b*) 1 Bac. Ab. tit. Leases, (I. 8.)

years, to which the same reasons do not apply.(c)

(c) Ib. [It should seem that a receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *Doe* ex dem. *Marsack and others* v. *Read*, 12 East, 57.]

† It is so settled: but a mere receiver of rents, as such, has no authority to determine a tenancy by notice. Whether, supposing the notice not to have been properly authorized when given, a subsequent recognition will have the effect of making it valid, is a question on which there seems to be some difference of opinion. In *Roe* v. *Pierce*, 2 Campb. 96, a verbal notice had been given by the steward of a corporation. It was objected, that the notice was insufficient, inasmuch as it ought to have been under the common seal of the corporation, or at least by a person appointed under that seal, of which there was no proof in the case: but Macdonald, C. B. held the notice sufficient, adding, that the corporation by bringing the ejectment showed that they authorized and adopted the act of the steward. Again, in *Goodtitle* v. *Woodward*, 3 B. & A. 689, a notice to quit given by an agent for several trustees jointly interested, acting under a written authority, signed by some only of the trustees at the time of giving of the notice, and by the rest subsequently, was held sufficient, on the ground that the subsequent recognition by all gave effect to the authority.(1) But in the recent case of *Doe* v. *Walters*, 10 B. & C. 626, some doubt was thrown on these authorities. The case was this: a notice to quit had been given by one who, so far as appeared in evidence, had no express authority from the landlord, but who had the general management of his affairs during his then residence abroad, and who had received rent from the tenant, though he had not let him the

(1) † The decision may be supported on another ground; for although at that time it was supposed that a notice by one of two joint tenants was not valid according to the case of *Right* v. *Cuthell*, 5 East, 491, yet the Court has since determined that such notice is sufficient. *Doe* v. *Summersett*, 1 B. & Ad. 135. †

So a letter of attorney to sue for, receive, and recover a debt, authorizes the attorney to arrest the debtor.(d) And so a broker employed to get a policy effected may adjust the loss,(e) and do all which is necessary for procuring the adjustment. Thus it has been decided, that an agent who underwrites and settles losses for another, has an implied authority from him to refer

land. At the trial the learned judge was of opinion, that such employment gave an implied authority to determine the tenancy by notice, and under his direction a verdict was found for the lessor of the plaintiff; but on motion for a nonsuit or new trial, the Court of King's Bench were unanimous, that the question of authority ought to have been left to the jury; and some of the learned judges intimated an opinion that the evidence of authority was extremely slight. It had, however, been urged in the argument, that the bringing of the ejectment was a ratification of the authority, as to which Littledale, J. declared his opinion, that if the agent had not authority to give such notice at the time when it was given, or at least when the half-year mentioned in it began to run, no subsequent recognition of his authority could make it valid; and Parke, J. declared himself dissatisfied with the reasons given for the decision in *Goodtitle* v. *Woodward*, and all were clearly of opinion that to give validity to a notice by a subsequent recognition, the ratification must at all events be given before the bringing of the ejectment, or rather the day of demise laid in the declaration.

(d) 1 Roll. Rep. 390; Palm. 394. In the case of *Bailey* v. *De Walkiers*, 10 Ves. 111, the defendant was abroad, but had left in England a general power of attorney to act for him, and to appear, defend, and compromise suits, execute deeds, &c. The answer was ordered to be put in by the attorney, without signature; it being a case where it was not necessary that the answer should be upon oath.

(e) *Richardson* v. *Anderson*, 1 Campb. 13, n.

a dispute about a loss to arbitration. (2) ┼ But an authority to receive and pay partnership debts, on a dissolution of partnership, does not give authority to accept or indorse bills in the joint names of the partners. (*f*)

[Neither does a letter of attorney to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases, and appoint substitutes, authorize the attorney to negociate bills received in payment, or to indorse them in his own name; and a general power to transact all business has no greater effect. (3)]

┼ Indeed all written powers, such as letters of attorney, or letters of instructions, receive a strict interpretation; the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect. The following case will fully illustrate this proposition: *Munnings* was a mer-

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(2) [*Goodson* v. *Brooke*, 4 Campb. 163.]

(*f*) *Kilgour* v. *Finlayson*, 1 H. Bl. 155.

(3) [*Hogg* v. *Snaith*, 1 Taunt. 347; and see *Hay* v. *Goldsmid*, there cited.] ┼ So in *Murray* v. *East India Company*, 5 B. & A. 204, the Court thought it quite clear that a power of attorney authorizing the agent to sue for, recover, and receive by all lawful ways and means whatsoever, all monies, debts, and dues whatsoever, and to give sufficient discharges, did not authorize him to indorse bills for his principal. And see *Gardiner* v. *Baillie*, 6 T. R. 591, ante, p. 178 and 179, note (5), on *Howard* v. *Baillie*. ┼

chant carrying on business on his own account, and also engaged in speculations jointly with *Rothery*, *Burleigh*, and others, went abroad on the partnership business, having given a power of attorney to *Rothery*, *Burleigh*, and *S. Munnings*, his wife, "jointly and severally for him and in his name and to his use, to sue for and get in monies and goods, to take proceedings and bring actions, to enforce payment of monies due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions, indorse, negociate and discount, or acquit and discharge the bills of exchange, promissory notes, or other negociable securities, which were or should be payable to him, and should need and require his indorsement; to sell his ships, execute bills of sale, hire on freight, effect insurances, buy, sell, barter, exchange, export and import all goods, wares, and merchandizes, and to trade in and deal in the same in such manner as should be deemed most for his interest; and generally for him, and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and other acts, deeds, matters, and things, as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and concerns, and as he might or could do if personally acting therein."

Some time afterwards he sent another power to his wife, separately authorizing her, among other things, "for him and on his behalf to pay and accept such bills of exchange as should be drawn or charged on him by his agents or correspondents, as occasion should require, &c. and generally to do, negociate, and transact the affairs and business of him, *Munnings*, during his absence, as fully and effectually as if he were present and acting therein." *Burleigh* corresponded with the defendant, and acted as his agent, both before and after the receipt of this power. *Munnings*, while abroad, employed part of the produce of the joint speculations in his individual concerns; and during his absence, *Burleigh*, for the purpose of raising money to pay to creditors of the joint concern who were become urgent, drew four bills of exchange upon *Munnings*, which were accepted by the procuration of his wife, and the proceeds applied in payment of partnership debts. Another bill was afterwards drawn in order to raise money to take up those bills, which last bill was drawn by *Burleigh*, payable to his own order, and accepted in the following form: "Accepted per procuration *G. G. H. Munnings, S. Munnings*," and was discounted by Messrs. *Attwood & Co.* bankers in London. *Munnings* having refused to pay the bill, *Attwood & Co.* brought an action against him, and the question was, whether under either of the before-mentioned powers *S. Mun-*

nings, the wife, had authority to bind her husband by this acceptance. Bayley, J. "This was an action upon an acceptance importing to be by procuration, and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly: by the first of the powers in question the defendant gave to certain persons authority to do certain acts for him, and in his name, and to his use: it is rather a power to take than to bind, and looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it. The first power therefore did not warrant this acceptance. The second power gave an express authority to accept bills for the defendant and on his behalf. No such power was requisite as to partnership transactions, for the other partners might bind him by their acceptance. The words therefore must be confined

to that which is their obvious meaning, viz. an authority to accept in those cases where it was right for him to accept *in his individual capacity.* Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents, but the drawer of the bill in question was not his agent *quoad hoc.* The bills are to be accepted too as occasion shall require. It would be dangerous to hold, that the plaintiff in this case was not bound to inquire into the propriety of accepting; he might easily have done so by calling for the letter of advice, and I think he was bound to do so. For these reasons I am of opinion that judgment of nonsuit must be entered."(4)

On the other hand, in a still more recent case, where certain persons had commissioned an agent to carry on for them mining speculations in America, had furnished him with instructions which contemplated the making of purchases and investments on the most extensive scale, and had given him an open letter of credit, authorizing him to draw on them to the amount of 10,000*l.* in the whole, and a letter of attorney conferring very large powers—among other things, to enter into, transact, *complete,* and execute contracts, &c. for lease or purchase of mines, ore, &c. and to conduct, manage, and carry on the working of such mines; to purchase all necessary tools, &c.

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(4) ‡ *Attwood* v. *Munnings*, 7 B. & C. 278. ‡

and to erect suitable buildings, &c.; the Court of Common Pleas considered, that the agent had an authority, necessarily implied in the terms of his power, to raise money for carrying into effect the objects of his commission, and consequently held the principals liable to repay a sum of 1500*l.* (beyond the 10,000*l.* obtained on the letter of credit,) which the agent had raised by bills on his principals—there being no evidence that the letter of credit was shown to the person who discounted the drafts, or that he had any knowledge of the previous advances made. (5) And in another case, a power for agents abroad to borrow money for the purposes of an association was implied as against a director of the association, although the letter of instructions authorizing them to draw bills, &c. was given in such a form as to be binding only on the individual trustees who had signed it. (6) ⊥

An agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer, so as to bind him by that indorsement. (*g*) So a servant entrusted to sell a horse may warrant, unless forbidden. (*h*) [And it is not necessary for the party insisting on the

(5) ⊥ *Withington* v. *Herring*, 5 Bingh. 442. ⊥
(6) ⊥ *Ducarrey* v. *Gill*, 1 M. & M. 450. ⊥
(*g*) *Fenn* v. *Harrison*, 3 T. R. 757; 4 T. R. 177.
(*h*) 5 Esp. 75; 3 T. R. 757.

warranty to show that he had any special authority for that purpose.(7)]

╁ It should seem, also, that a banker may *negociate* bills paid in by a customer and indorsed by him, if the state of the customer's account render it reasonable for him to do so.(8)╁

The extent or scope of an authority is to be gathered from the commission by which it is given. And the construction of mercantile commissions, like that of other mercantile instruments, is to be assisted by the usages of trade, and for that purpose the evidence of persons conversant in mercantile affairs is resorted to.(*i*) Therefore a commission to a factor to sell is now held to give him a power to sell upon credit in those trades where that is the usual course of dealing.(*k*)

2. There may be many cases, as elsewhere observed, in which the acts of an agent, though not in conformity to his authority, may yet be binding

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(7) [*Alexander* v. *Gibson*, 2 Campb. 555. See also the case of *Runquist* v. *Ditchell*, ib. 556, n. (*a*); 3 Esp. N. P. C. 64, S. C.]

(8) ╁ *Thompson* v. *Giles*, 2 B. & C. 429, per Bayley, J.╁

(*i*) See an instance *Ekins* v. *Maclish*, Ambl. 185, where Lord Hardwicke examined merchants as to the extent of an agent's authority under the particular words of his commission.

╁ The construction of a written instrument, whether mercantile or otherwise, is for the Court, and not for a jury, to give. The Court, however, may, where the construction is doubtful, receive evidence in aid of its judgment.╁

(*k*) 12 Mod. 514; Willes, 407, ante; 1 Campb. 259, post.

upon his employer, who is left in such cases to seek his remedy against his own agent.(*l*) Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being *general* or *special*. By a *general* agent is understood, not merely a person substituted in the place of another for transacting all manner of business (since there are few instances in common use of an agency of that description,(*m*)) but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negociate certain contracts, and the like.(9)

(*l*) Ante, Ch. I.

(*m*) Sir Philip Sidney gave a letter of attorney to Sir Thomas Walsingham to act and sell all his lands, and all his goods and chattels; and this was held good. 1 Salk. 96.

(9) [" A general authority does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." Per Lord Ellenborough, in *Whitehead* v. *Tuckett*, 15 East, 408.]

† A general authority arises from a general employment in a specific capacity—such as factor, broker, attorney, &c. When we can say of any one that he is A.'s broker, or A.'s factor, or A.'s attorney, he has then a *general* authority in the sense in which it is used in the text. But, of course, this does not imply that he has an *unlimited* or *unrestrained* authority. A. may give his broker, or his factor, or his attorney, any instructions that he pleases, and the effect will be this: *as between himself and his broker*, &c. any deviation from these instructions will render the latter accountable to him for any loss he may sustain thereby; but, as *regards himself and third parties*, who may have dealt

An authority of this kind empowers the agent to bind his employer by all acts within the scope of

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with the broker, &c, any limitation of the authority not communicated to them can have no effect. A third person has a right to assume, without notice to the contrary, that the person whom A. employs generally as his broker, &c. has also an unqualified authority to act for his principal in all matters which come within the scope of that employment. In the case of a particular agent—one, that is, whom A. may have employed specially in that single instance—no such assumption can reasonably be made. It then becomes the duty of the party dealing with one whom he knows to be acting for another in the transaction, to ascertain by inquiry the nature and extent of the authority; and if it be departed from or exceeded, he must be content to abide the consequences. The distinction thus pointed out is perfectly consonant with right reason, and if duly attended to will satisfactorily explain all the cases which follow in the text, and is further illustrated by that of *Whitehead* v. *Tuckett*, mentioned above.

Sill & Co., brokers, had sold sugars of their principals at a price which, it was contended by the principals, was under the amount limited by their instructions. The principals had consequently taken possession of a part of them which remained undelivered; and the purchasers brought an action of trover, in which they recovered. "Sill & Co." said Lord Ellenborough, "were *general* agents, for they bought and sold in a multitude of instances in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant [the principal]: and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the interposition of any check."

The same principle has been applied, as it naturally would be, to partners. Partners may, and frequently do by their articles of partnership, impose restrictions on the course of dealing; and as between themselves whoever infringes these regulations will be liable to his copartners. But the world knows nothing of these

his employment, and that power cannot be limited by any private order or direction *not known to the party dealing with the agent.*(n) And this seems to be founded not so much upon the presumption of an authority given, as upon the principle that where one of two innocent persons must suffer by the fraud of a third, he who enabled that person, by giving him credit, to commit the fraud, ought to be the sufferer.(o) But a *special* agent, who is employed about one specific act, or certain

private stipulations, and therefore the contracts of any individual partner in the name of the firm will bind the rest, however contrary it may be to their own regulations, provided it be within the ordinary course of business of that firm. And the doctrine has been carried even further: for a guarantee given in the partnership name by one partner, without the knowledge of the other, was held binding on his copartner, though *contrary to their own course of dealing*, as well as to their private arrangement with each other. "It is true," says Mr. Justice Bayley, who had in the first instance entertained doubts which were then altogether removed, "that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has *reference to business transacted by the partnership*, although out of the regular course, it is still within the scope of his authority, and will bind the firm." *Sandilands* v. *Marsh*, 2 B. & A. 673. ⍊

(n) Post. In the case of *Petties* v. *Soame*, Goldsb. 138, it is reported as follows: "If one be factor for a merchant, to buy one kind of stuff, as tin, and the said factor hath not used to buy any other kind of wares, but this kind only for his master; now if the said factor buy silks or any other commodities for his master, and assumes to pay money for that, the master shall be charged in an assumpsit for the money, and for that let the master take heed what factor he makes."

(o) 3 Salk. 233; 1 Ld. Raym. 225. (15 East, 400.)

specific acts only, does not bind his employer, unless his authority be strictly pursued; for it is the business of the party dealing with him to examine his authority; and therefore if there be any qualification or express restriction annexed to the commission, it must be observed, otherwise the principal is discharged. This principle is particularly exemplified in the case of *Fenn* v. *Harrison*, where the defendants, being possessed by indorsement of a bill of exchange, employed *F. Huet* to get it discounted, telling him to carry it to market and get cash for it, but that they would not indorse it. *F. H.* applied to another person, telling him that though the defendants would not indorse it, yet as their number was upon the bill, that was the same as an indorsement, and that he *(F. Huet)* would indemnify him if he indorsed it. This person accordingly, by putting his own indorsement upon the bill, got it discounted. On the failure of the drawer and acceptor, the holders discovering that the bill had passed through the defendants' hands, applied to them for payment, who at first refused, but afterwards promised to take it up. Upon this promise the action was brought; and the question was, if there were [whether there was] any consideration for the promise, which depended upon whether *F. H.* had power to warrant the goodness of the bill. The plaintiff had a verdict; but upon a motion for a new trial, upon the ground that this

was *nudum pactum*, the Court(*p*) set aside the verdict, and in stating their reasons said, if *F. H.* had been the *general* agent of the defendants, it would be admitted that they would be liable for his acts; but it appears from the evidence that he was constituted their *particular* agent with a *circumscribed* authority. And that brings it to the case put of the sale of a horse, in which the distinction is, that if a person keeping livery stables, entrust *his servant* with a horse to sell, and direct him *not* to warrant, and the servant did nevertheless warrant him, still the master will be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed cognizant of any private conversation between the master and the servant; but if the owner of a horse send a *stranger* to a fair *with express directions not to warrant the horse*,(*q*) and the latter act contrary to the orders, the purchaser can only have recourse to the person who actually sold the horse, and the owner is not liable on the warranty. That is a similar case to the present; for *F. Huet*, who was employed to get the bill discounted, was expressly directed by them not to indorse it. There is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a

(*p*) Diss. Ld. Kenyon. (*q*) See post.

merchant residing abroad, the principal is bound by his acts.(*r*) But an agent constituted so for a particular purpose, and with a limited and circumscribed authority, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent.(*s*)

A comparison also of the following cases will tend to place this principle in a clearer point of view. A merchant sent his servant, *who had used to transact affairs of that nature for him*, with a note drawn upon S. E. with orders to get ↓ from him ↓ either bank bills or money, and turn them into exchequer bills; the servant instead of doing so got B. to give him a bank bill for it, with which he bought exchequer bills and carried them to his master; and before the bill upon S. E. was paid, S. E. broke. The question was, whether the loss should fall upon B. or upon the merchant. At the trial, Parker, C. J. was first of opinion that it should fall upon B. because the servant acted directly contrary to his master's orders, and B., by furnishing the servant with a bank bill, did the master no service at all, for if he had not, the servant must have gone and received the money himself from S. E.; and he referred to the case of *Ward* v. *Evans*, (*t*) in which he said it had

(*r*) See note (*o*) page 171.

(*s*) *Fenn* v. *Harrison*, 3 T. R. 757; and 4 T. R. 177, post.

(*t*) Post.

been decided that a servant sent to receive money could not bind his master by receiving a bill; but upon the suggestion of one of the jury, that whether a servant *who was used to act* upon the credit of his master, went against his orders in a particular instance, was a fact that could not be known to a third person, he altered his opinion, and a verdict was given against the master, which was afterwards attempted to be set aside. But the Court were all of opinion that it was right, and that the master was chargeable; for a servant by *transacting affairs for his master* does thereby derive a general authority and *credit* from him; and if this general authority should be liable to be determined for a time by any particular instructions or orders, there would be an end of all dealing but with the master. (*u*) It is observable, that in this case the fact of a *general* authority is expressly insisted on, which distinguishes it from that of *Ward* v. *Evans*, cited by the Chief Justice, which was this: *Ward* sent his servant to receive 50*l.* from B.; the latter desired *Sir Stephen Evans*, who owed him a sum of money, to strike off 50*l.* from his debt, and pay *Ward*'s servant. *Sir S. Evans* accordingly credited himself with 50*l.* in B.'s account, but instead of giving *Ward*'s servant money, gave him another person's note,

(*u*) *Nickson* v. *Brohan*, 10 Mod. 109; see also *Thorold* v. *Smith*, 11 Mod. 8.

which the servant took for payment. The note not being paid, *Ward* brought an action against *Evans* for money received to his use. It was insisted that the defendant was discharged by the servant's taking the note in payment; but the Court, (who also resolved that the action for money had and received was proper) (10) were of opinion that the act of the servant in receiving a note instead of money did not bind the master under these circumstances. (*v*) This, it is to be remarked, appears to have been the case of a servant employed in that particular instance only.

┼ The same distinction was applied to the following case. A gentleman drew a check on his banker in favour of a creditor, and delivered it to his *farm bailiff* (who was in the habit of buying and selling cattle for him), to be given to the creditor. The bailiff, however, at the request of the creditor, discounted it with another bank and paid him the proceeds. Five days afterwards the bank, on which the check was drawn, failed, and the bankers who had discounted it, having failed to present it, sought to recover the amount from the drawer. The jury found a verdict for the plaintiff, upon which a new trial was obtained in the Court of Exchequer. There were other points in the case to which it is unnecessary to

(10) ┼ In which, however, the Court was wrong. ┼

(*v*) *Ward* v. *Evans*, 2 Ld. Raym. 930; Salk. 442.

advert: on the point now under consideration, Alexander, C. B., in delivering the judgment of the Court, said—"It appears to me to be a very dangerous doctrine, to establish that a person filling a capacity like that of the defendant's farming bailiff should, without a specific authority for that purpose, have power to bind his master, and with such an impression on my mind I cannot subscribe to the opinion of the learned judge who tried the cause. On the contrary, I think the particular circumstances of the case negative any such authority."† (11)

3. A general power to buy or sell binds the person giving it as to all others dealing *bonâ fide*, however disadvantageous the terms of the contract may be.

A factor is one who has a general power to buy and sell according to the best of his judgment, and therefore all bargains which third persons make with him without fraud or collusion may be enforced against his principal; and if he sell for a less price than his commission directs, his sale is nevertheless valid.(*w*) And there is a case in which it was held, that where a general factor resident abroad, and usually employed in the purchase of silk, bought a commodity of a different kind, the principal was chargeable.(*x*) † And

(11) † *Waters* v. *Brogden*, 1 Y. & J. 457. †

(*w*) Ambl. 498.

(*x*) *Petties* v. *Soame*, 13 Vin. Ab. 6.

the like general power may be presumed and to the same extent in the case of a broker, if the principal has allowed him to have the apparent control and disposition of the goods.⸸

But a special authority must be strictly pursued.(*y*) Therefore where a particular authority was given to sell by auction at not less than a certain sum, and the agent sold by private contract, though without fraud, and the sum obtained was more than the price fixed, a specific performance was refused in a Court of Equity.(*z*) So if a person specially authorized to bid a certain price for another, should offer more than he was empowered to do, he would be liable himself, and not his employer.(*a*) An auctioneer may ⸸indeed in all cases⸸ be considered as a special agent for the purpose of sale, and as soon as the sale is complete, his agency ends; he has no authority therefore to bind his employer by treating of the terms upon which a title is to be made.(*b*)

Thus also, if a broker be employed to make one particular purchase of goods of a certain description and price, the principal will not be bound by his contract if the broker depart from his instructions in either of those particulars; but in

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(*y*) Ante, p. 199, n. (9).

(*z*) *Daniell* v. *Adams*, Ambl. 498; ⸸ and see *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.⸸

(*a*) Ib. per S. T. Sewell, Master of the Rolls.

(*b*) *Seton* v. *Slade*, 7 Ves. 276.

the case of a factor or general broker, it would be otherwise.(*c*)

4. But, inasmuch as a power to do any act comprises a power to do all such subordinate acts as are usually incident to or are necessary to effectuate the principal act in the best and most convenient manner,(*d*) it is necessary even in regard to a special agent, if it be intended to exclude from his authority any circumstance which would otherwise fall within it, that it should be done by express directions. Thus, though it has been decided that a special agent, employed to negociate a bill of exchange, and expressly directed not to indorse it for his principals, could not bind them by doing so; (*e*) yet when the fact appeared to be that the agent was merely commissioned by the defendants to get the bill negociated, and no express directions given him not to indorse it, it was resolved that the defendants, having commissioned the agent to get the bill discounted, without restraining his authority as to the mode of doing it, were bound by his acts: and therefore that he having warranted the bill to be a good one, this constituted a good consideration for their subsequent promise to pay it.(*f*) In

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(*c*) *East India Company* v. *Henley*, 1 Esp. Cas. 111.

(*d*) Ante, p. 189, &c.; 1 Campb. 43 b.

(*e*) *Fenn* v. *Harrison*, 3 T. R. 757; ante.

(*f*) *Fenn* v. *Harrison*, 4 T. R. 177.

the case also already put of a warranty of a horse made by an agent, where it is stated (*g*) that a special agent cannot bind his employer by a warranty, it is with this qualification, that *he is expressly directed not to warrant*, (*h*) for otherwise, if a master entrust his servant to sell a horse, and give no directions respecting the warranty, he is bound by the warranty of the servant (*i*) upon the principle before mentioned, that every thing is supposed to be comprehended in an authority, which is necessary to effectuate the object in the best manner. Thus in an action for a breach of contract in refusing to receive goods bargained for at a certain price, the defence was, that the contract was made by a special agent who was limited as to the price, which he had exceeded. Upon the examination of the agent himself, it appeared that though his instructions were to buy at a specified price, yet that he understood himself to have a discretionary power of exceeding that price if necessary. Upon this testimony it was ruled that though a special agent (which this was admitted to be) acting under a limited authority could not in general bind his principal, if he exceeded that authority, yet that the limita-

(*g*) Ante, p. 203. (*h*) Ib.

(*i*) *Helyear* v. *Hawke*, 5 Esp. 75, per Lord Ellenborough; and see *Runquist* v. *Ditchell*, 3 Esp. 65; *Alexander* v. *Gibson*, 2 Campb. 555.

tion must be express and positive, and not subject to the agent's discretion. (*k*)

Other instances referable to this principle will be met with in the sequel. (*l*)

Whether an agent has a general or only a special authority is properly matter of evidence for the consideration of a jury. (*m*) And it is almost superfluous to observe, that repeated instances of similar acts acquiesced in by the employer, is evidence of an authority for the act in question. (*n*)

5. Where the authority given has been exceeded, subsequent assent of the principal has the same effect as it has already been observed to have in cases where no previous authority has been given. (*o*)

SECTION 6.

The Power of Factors, or other Agents, in the Disposition of Goods, and herein of the Factor's Act.

In the contract of sale by an agent, as in all other acts done by him, it is essentially requisite, in order to bind the principal, that the authority,

(*k*) *Hicks* v. *Hankin*, 4 Esp. 116; ⊥ and see *Whitehead* v. *Tuckett*, 15 East, 440. ⊥

(*l*) Abbot, 92, 93.

(*m*) Per Holt C. J. and Powell, J. *Thorold* v. *Smith*, 11 Mod. 88. ⊥ *Dyer* v. *Pearson*, 3 B. & C. 38. ⊥

(*n*) Ib. per Powell, J. (*o*) Ante, p. 172.

either express or implied, should be pursued. The rules by which the extent and effect of that authority are to be estimated have been attempted to be explained in the preceding sections.

1. In the absence of particular instructions, a general power to sell implies a power to sell in the usual way; and therefore the right of an agent, under such a general authority, to sell upon *credit*, depends entirely upon the fact of that being the usual mode of dealing in the particular trade in question. If there be no such usage, no contract is created between the principal and vendee, and such sale is a conversion in the factor, and if not in market overt, no property is thereby altered, but trover will lie against the vendee: so likewise if it be in market overt, and the vendee knows the factor to sell as factor. (*a*) It is now indisputable, though formerly doubted, that factors may sell upon credit, "because it is the constant and daily practice for them to do so."(*b*) And where the practice is otherwise, the agent's power is limited accordingly. Thus on the transfer of *stock*, which is usually sold for ready money only, it was lately held that a sale for a bill at fourteen days could not be enforced; the transaction being conducted by a stock-broker to whom a general authority was given to sell. Upon that occasion Lord Ellen-

(*a*) Per Holt, C. J. 12 Mod. 514.

(*b*) Willes, 407; *Houghton* v. *Mathews*, 3 Bos. & Pull. 489.

borough said, When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of stock, which he agrees to sell? The broker here sold the stock in an *unusual* manner; and unless he was expressly authorized to do so, his principal is not bound by his acts(*c*).

2. A power to sell, such as is possessed by a factor or broker appointed for that purpose, can only be executed by way of sale, and does not justify a disposition in any other manner. ⊥ A factor, therefore, cannot dispose of the goods in the way of barter: (1) and ⊥ it is clearly settled that he has no authority to *pledge* the property entrusted to him. (*d*) Nor is it of any conse-

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(*c*) *Wiltshire* v. *Sims*, 1 Campb. 258.

(1) ⊥ *Guerreiro* v. *Peile*, 3 B. & A. 616. ⊥

(*d*) *Paterson* v. *Tash*, 2 Str. 1182. *Daubigny* v. *Duval*, 7 T. R. 606. *De Bouchot* v. *Goldsmid*, 5 Ves. Jun. 211.

[The propriety of the doctrine laid down in *Paterson* v. *Tash* has been questioned by Lord Ellenborough in succeeding cases, although his Lordship has not professed to overrule it. In the case of *Pickering* v. *Busk*, 15 East, 44, Lord Ellenborough, alluding to this case, said, "*It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale.*" And in the more recent case of *Martini* v. *Coles*, 1 Maule & Selw. 146, his

quence that the pledgee is ignorant of the factor's not being the owner. (*e*)

In trover for a certain quantity of tobacco, the facts were, that the plaintiff, a merchant, employed an accredited broker in the tobacco trade, and who dealt in that article on his own account, to purchase some for him. The broker made the purchase in his own name, and had it transferred to himself in the King's warehouse. While it remained there the broker pledged it to the defendant, who was wholly ignorant of the transaction between him and the principal merchant; but upon his refusing to deliver it up, the latter was held entitled to recover. (*f*)

[And even in the case of a factor, whose course of dealing justifies the implication of an authority to sell, the sale must be absolute, in order to be binding upon the principal, for if the goods be placed in the hands of third persons, not as buyers but for the purpose of obtaining a buyer, this disposition of the property amounts to a pledge, and

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Lordship observed, "*Perhaps it would have been as well if it had been originally decided, that where it was equivocal whether a person was authorized to act as principal or factor, a pledge made by such a person, free from any circumstances of fraud, was valid. But,*" continued his Lordship, "*it is idle now to speculate upon this subject, since a long series of cases has decided that a factor cannot pledge.*"]

(*e*) 5 Ves. Jun. 213. *Newsom* v. *Thornton*, 6 East, 17.

(*f*) *M'Combie* v. *Davies*, 6 East, 538.

the pawnees have no right to retain it, or the proceeds of it, from the principal, although they may have made advances to the factor upon it.](3)

The same rule applies to the assignment of a bill of lading by a factor, which cannot be transferred by way of pledge, so as to exclude the principal's right to stop in transitu; for a bill of lading, which is an authority to receive the goods, cannot give the factor a greater power over them, than the possession of the goods themselves would do. (g)

[In that case the transfer of the bill of lading was originally *tortious*, because it was *deposited as a security* for advances made by the indorsees: but the same rule applies even where the transfer and indorsement of the bill of lading was rightful in the first instance, ⸸ if it be subsequently converted into a pledge ⸸. Therefore, where goods were consigned from abroad to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor, or his assigns, and the factor afterwards indorsed and

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(3) [*Shipley* v. *Kymer*, 1 M. & S. 484.] ⸸ And substantially the same point was decided in *Solly* v. *Rathbone*, 2 M. & S. 298, ante, p. 150; and *Cochran* v. *Irlam*, ib. 301, ante, p. 177; in both of which cases it was held, that the power of the factor was *strictly* a power to sell; and that if the goods were delivered by him to another, whom he had made his substitute, even though not in the way of a pledge, yet that other acquired no lien for advances made or charges incurred in respect of the goods. ⸸

(g) *Newsom* v. *Thornton*, 6 East, 17.

delivered the bill of lading, together with the goods, to the indorsees, as brokers, *with instructions to do the needful,* and subsequently the indorsees made advances to him on the credit of those and other goods, without knowing that he was not the owner of them, it was held that the indorsees could not retain the goods against the consignor, until payment of the debt due to them from the factor on account of those advances. (4)]

Although the factor himself have a lien upon the property pledged, which would entitle him to retain it; yet this being a personal right, cannot be transferred to the pawnee, so as to give him a title even to the amount of the lien. (*h*) A different opinion at first entertained by Lord Kenyon upon this point, seems to have been subsequently abandoned by him. (*i*)

In the case already mentioned, (*k*) the pledgee, upon a second trial, relied upon the further circumstance in his favour, that the broker was in advance for his principal, and had therefore a lien, of which it was insisted that the pledgee ought to have the benefit. But it was said by the Court to be clear that liens were personal, and could not be transferred by any *tortious* pledge of the principal's goods. (*l*)

(4) [*Martini* v. *Coles*, 1 M. & S. 140.]

(*h*) *Daubigny* v. *Duval*, 5 T. R. 604.

(*i*) See 7 East, 7, per Lord Ellenborough.

(*k*) *M'Combie* v. *Davies*, 6 East, 538.

(*l*) *M'Combie* v. *Davies*, 7 East 6. In the case of *Daubigny*

But this must be understood as applied to the *tortious* transfer of the goods of the principal by the broker undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints him as his servant to keep possession of the goods for him, in his name, and as a continuance in effect of his own possession; in which case he may preserve the lien.(*m*) And where a consignee of goods, for the purpose of sale, deposited them with a broker, who, upon the faith of that deposit, advanced money to pay the duties and other charges upon those goods, he was held to stand in the situation of the consignee, and entitled to retain till his advances were satisfied;(*n*) for this formed a particular lien upon the goods not derived from the consignee.(5)

v. *Duval*, 5 T. R. 604, the plaintiff had tendered to the factor the amount of his lien; but in the case of *M'Combie* v. *Davies*, it does not appear that any tender was made either to the pledgee or the broker.

(*m*) Ibid. per Lord Ellenborough, 7 East, 7, 8; and see *Man* v. *Shifner*, 2 East, 523, 529, where the same point is recognized and exemplified.

(*n*) *Pulteney* v. *Kymer*, 3 Esp. Cas. 182.

(5) [This case appears to have been overruled by the subsequent cases of *Solly* v. *Rathbone*, and *Cochran* v. *Irlam*, *supra*, where it was held, that as there was no privity, no lien could be acquired.]

Upon the same principle that has been mentioned to govern the case of factors, it has been resolved, that a general power by letter of attorney to sell, assign, and transfer stock, does not authorize the agent to transfer it by way of security for his own debt, though there was no collusion on the part of the pledgee.(*o*)

It seems, therefore, that before the passing of the statutes presently to be adverted to, the law stood thus:—A *broker* employed to purchase had, as such, no authority to sell; and his principal might reclaim goods disposed of by him, into whatever hands they had come, unless, 1st, it were a *bonâ fide* sale in market overt, which the policy of the law never permitted to be disturbed; or 2dly, the principal had himself allowed the broker to mislead the party to whom the transfer had been made, by enabling him to appear in the character of owner. A *factor* had, as incident to his character of factor, a right to *sell;* but he had no right to dispose of the property of his principal in any other manner, whether by barter, or by pledge, or by deposit for the purpose of being sold by another; and if he did so, the principal might follow the property or the proceeds, so long as it could be specifically traced, and to re-

(*o*) *De Bouchot* v. *Goldsmid*, 5 Ves. Jun. 211.

cover it absolutely and free of all charges; for the transferree could not claim in right of the factor—lien being a personal and intransferable right—nor in his own right—because the possession out of which the lien must arise was, as against the owner, a *wrongful* possession.

Nor could the effect of this rule be evaded by a colourable sale. The Court looked to see what was the true nature of the transaction, and adjudged accordingly. What was originally a pledge, and consequently wrongful, could not be legalized by the subsequent formalities of sale; nor conversely could the previous formality give validity to the transaction, if it appeared from the subsequent mode of dealing that in substance it was a mere advance on the security of the goods. Neither did it vary the case, that the factor himself was under advances for his principal, which the goods were *bonâ fide* pledged to meet; nor even that the principal had drawn upon the factor on the faith of those very goods—no inference of an authority to pledge being suffered to arise from what was in fact a not uncommon arrangement between the principal and his correspondent. And lastly, it was equally immaterial whether the pledgee knew that he was dealing with a factor, or whether he acted under a *bonâ fide* impression that the holder of the goods or documents was himself the real owner.

Still, in the case of the factor, as in that of the

broker above mentioned, if the principal had by his own incaution, or for his own convenience, enabled the factor to mislead the parties with whom he had dealt into a belief that he was himself the owner, he would have been precluded from claiming restitution. But it was clear that the mere *possession* of the goods by the factor was not sufficient to mislead—because *that* as factor he would necessarily have—nor, therefore, the holding of a document entitling him to the possession, such as a bill of lading or dock warrant—because the right to possess being less than the actual possession could not, to say the least, confer a larger title. In fact, the only mode in which the principal could bring himself into wrong in this way, was by allowing the *invoices* to be made out to the factor or purchaser, and this therefore seems to be the only exception which could have been made available to a pledgee.(1)

The rules here laid down being inflexibly adhered to by the Courts, notwithstanding the seeming hardship of particular cases, gave rise to some complaints among mercantile men: and

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(1) ┼ See, in support of the propositions in the text, the following cases, in addition to those which have been already cited in the text and notes: *Glynn* v. *Baker*, 15 East, 509; *Boyson* v. *Coles*, 6 M. & S. 14; *Kuckein* v. *Wilson*, 4 B. & A. 443; *Guichard* v. *Morgan*, 4 Moore, 36; *Gill* v. *Kymer*, 5 Moore, 503; *Duclos* v. *Ryland*, ib. 518, n.; *Barton* v. *Williams*, 5 B. & A. 395; *Williams* v. *Barton*, 3 Bingh. 139; *Steirneld* v. *Holden*, 4 B. & C. 5; *Jackson* v. *Clarke*, 1 Y. & J. 210. ┼

indeed, several of the judges had themselves, in administering the law as they found it handed down to them, seemed to intimate a wish, that it had been originally settled otherwise.(2) Others, however, had vindicated both the justice and policy of the common law in establishing and maintaining the restriction, and good reasons were not wanting on either side to support their several opinions.(3) Nevertheless, by the exer-

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(2) ‡ See the observations of Lord Ellenborough and Le Blanc, J. in *Martini* v. *Coles*, 1 M. & S. 118; and of Best, C. J. in *Williams* v. *Barton*, 8 Bingh. 139. ‡

(3) | See the remarks of Abbott, C. J. and also of Bayley, Holroyd, and Best, Justices, in *Ducl[illegible]* v. *Ryland*, 5 Moore, 518, n. "It is now too late," observed C. J. Abbott, "to consider whether a factor can or cannot pledge the goods of his principal. The rule of law is too well established to be now disturbed. The argument which has been addressed to us as to the hardship of the law has been urged in every case in which this question has been considered. The answer to it is, that he who advances his money ought to take care to protect himself against the fraud of the person to whom he advances. This caution is as necessary to the foreign as the English merchant. He who sends his goods to this country for sale, ought to be secure in the confidence he reposes in the honesty of our merchants; that is the policy of the English mercantile law. The rigid adherence to the rule, that a factor cannot pledge goods of his principal, will only have the effect of making people more careful how they advance their money; and nothing is more easy than the exercise of that caution, viz. by requiring the person who desires to have an advance of money to show his title to the property on which he asks such advance. This will not destroy that wholesome confidence which ought to exist between merchants. If people will blindly advance their money to those who ask for it

tions principally of the monied capitalists in London, whose interests were most affected by the existing state of the law, in the year 1823 an Act of Parliament was obtained (4 Geo. IV. c. 83,) by which material alterations were introduced for the benefit of persons dealing with factors: and after an experience of two years, the main provisions of it were incorporated into the amended act of 6 Geo. IV. c. 94, by which the rights of factors, or rather of persons dealing with them, are now, so far as regards the subject under consideration and some other matters, definitively settled.

By the 1st section of this act, the person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person to his use, *if he has not notice by the bill of lading or otherwise,* at or before the advance or receipt, that such person is not the actual and bonâ fide owner of the goods; and such person shall be taken for the purposes of the act to have been entrusted with goods for the

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without exercising a little caution, they must take the consequences of their own indiscretion."

The arguments for and against the policy of the change are briefly summed up in a note to the case of *Blandy* v. *Allan*, Dan. & Lloyd's Merc. Cases, 29.

purpose of consignment or of sale unless the contrary be made to appear.

By the 2d section, a person entrusted with and in possession of a bill of lading, certificate, or warrant or order for the delivery of goods (the several species of which are enumerated) is to be deemed the true owner of the goods described therein, so far as to give validity to any contract made by him for the sale or disposition of the goods, or the *deposit or pledge thereof*, if the buyer, transferree, or pawnee, has not notice by the document or otherwise, that such person is not the actual and bonâ fide owner of the goods.

By section 3, any person taking goods in deposit or pledge from the party in possession, without notice that he is not the owner thereof, *for a pre-existing debt*, shall acquire such right, title, or interest, and no further or other than was possessed by the person making the deposit or pledge.

By the 5th, any person may accept goods or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but in such case he shall acquire such right, title, or interest, and no further or other than was possessed by the factor or agent at the time of the deposit or pledge.

And by the 4th section, any person may contract for the purchase of goods with any agent

entrusted with the possession of them, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he may have notice that the person with whom he contracts is an agent, if such contract and payment be made in the usual course of business, and he has not at the time of contract or payment, notice that the agent is not authorized to sell or to receive the price.

It is further provided, that the act shall not prevent the true owner of the goods from recovering them from his factor or agent before a sale, deposit or pledge, or from the assignees of such factor or agent in the event of his bankruptcy, nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged upon repayment of the money, or restoration of the negociable instrument, advanced on the security thereof, to the factor or agent, and upon payment of such further money or restoration of such other negociable instrument (if any) as may have been advanced by the factor or agent, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods, after deducting the money or negociable instrument advanced on the security thereof. And in case of the bankruptcy of the factor or

agent, the owner of the goods so pledged and redeemed shall be held to have discharged *pro tanto* his debt to the estate of the bankrupt. (4)

It will be seen from this abstract, that as regards the dealing with factors or consignees in the way of purchase, the act is merely a confirmation of the common law. Of payments to the factor in respect of such purchases, (as to which the same observation is applicable,) we shall have occasion to treat hereafter. The remaining provisions by which the alterations are introduced may be classified thus:

It sometimes happens that for the convenience of the merchant goods are shipped in the name of a factor. But by the common law a consignee who made advances to the shipper, on the faith of his being the owner, had no lien upon the goods against the person to whom they really belonged. By the present act this lien is given to him.

As to the right of the factor to pledge or deposit, there are three distinct cases: 1st. where goods, or documents for the delivery of goods, are taken in pledge as a security for *advances, with a knowledge* that they are not the property

(1) The act is given at length in the Appendix. The above abstract is for the most part a transcript of that given by Lord Tenterden in "The Treatise on Shipping," 5th edit. which it was difficult to alter without rendering it worse.

of the person pledging them. By this transaction the person to whom they are pledged acquires the same right upon them, which the factor could have enforced against the owner at the time of the deposit, or, to speak more technically, the lien of the factor against his principal is transferred to the pawnee. The second is, where goods are taken in pledge from a factor *without notice* that they are the property of another, as a security for *a pre-existing debt* of the factor to the pledgee; this pledge also gives to the pawnee the same right as the last. The third is, where documents for the delivery of goods are received in pledge from the holder, as a security for advances made upon the faith of those documents, without notice *either from the documents themselves or otherwise* (5), that the holder is not the owner of the goods described; and in this case the pledgee has power given him by the statute to retain the documents, and by consequence the goods, until these advances are repaid—in other words, he has an absolute lien upon them for the whole amount.

It is to this last provision that the objections urged against the act principally apply. The others seem to be equitable enough, for surely it is but just that the owner should, before obtaining

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(5) These words "or otherwise" were introduced, it is said, by Lord Eldon in committee. They have altered the whole character of the section.

possession of the goods, satisfy the bonâ fide claim of the factor, and but reasonable that the factor should have the power of availing himself beneficially of that just claim, by transferring it for value to another.

But the policy of the more extensive privilege conferred by the second section is certainly questionable; and although the purpose of this treatise is rather to state what is law, than to criticise it, it may not be out of place to remark that the Courts seem inclined to confine the operation of the second section within close limits, whilst the juries on the other hand seem equally inclined to extend it.

The privilege conferred by that section applies only to a case where the pledgee has not notice either from the document, *or otherwise*, that the holder is not the true owner. What shall be considered as amounting to notice becomes therefore a very material question; and it seems to be now generally understood—perhaps it may even be considered as established—that it is not necessary for the owner, seeking to recover property thus alienated, to show that the pledgee *had positive information* that he was dealing with a mere agent, but that it is sufficient if the circumstances are shown to have been such as might, and with a reasonable man would, have led to that conclusion.

In the following case the jury were directed accordingly by Lord Tenterden. The plaintiffs

had purchased from Nevitt & Co., brokers in Liverpool some chests of indigo, the warrants for which having been suffered to remain in the hands of the brokers, were pledged by J. Nevitt, one of the firm, with the defendants, who afterwards obtained the indigo under them. The main question in the cause was, whether the defendants had *notice* within the meaning of the second section that J. Nevitt was not the owner; and Lord Tenterden intimated in the course of the trial that if the defendants had even *good reason to suspect* that he was not, that would be notice sufficient to deprive them of the protection of the statute. Much evidence was given for the purpose of raising this inference, and the effect of the whole appeared to be that the defendants must have known that J. Nevitt held the warrants merely as broker. Some observations were made by the counsel for the defendant, in his address to the jury, on the intimation which had fallen from the Chief Justice, and his lordship therefore, in summing up to the jury, may be supposed to have been careful in expressing himself with accuracy. "The expression of the statute," his lordship said, "is, that a party is to be entitled to its protection if he shall not have notice by the documents or otherwise, that the pledger was not the actual and bonâ fide owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being

aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of those ways is enough, I think, to exclude a party from the benefit of the provisions of this statute. Slight suspicion, I think, will not. The question I shall leave to the jury in this case, where there is no evidence of direct communication, is, whether the circumstances were such that a reasonable man, and a man of business, applying his understanding to them, would know that the goods were not Nevitt's, if so, the defendants are not entitled to retain them." The jury found a verdict for the defendants. (6)

By other cases in which questions have arisen upon the construction of this act, it has been determined, that the "negotiable instruments" mentioned in the second section *as a security*, are such as pass by indorsement and delivery, as bills of exchange and promissory notes, and not East India warrants, or other documents of that nature; (7) that the third section, which transfers to a person taking goods in pledge for an antecedent debt the same

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(6) ┼ *Evans* v. *Trueman*. The report here given is taken partly from 2 Moody & M.'s N. P. C. 10, and partly from the notes and recollection of the editor himself. The verdict certainly occasioned some surprise. ┼

(7) ┼ *Taylor* v. *Truman*, Lloyd & Welsby, 184. 1 Moody & M. 153. And the same point was determined in the very recent case of *Taylor* v. *Kymer*, B. R. Trin. Term, 1832. ┼

right as the factor had at the time of pledge, does not prevent the owner from bringing an action of *trover* against him to recover them, though the measure of damages may be the balance only, after deducting what was due to the factor(8)—that if the pawnee retain the goods, the sum due to the factor ought to be tendered by the owner; but that if he have sold them before demand, such tender is unnecessary(9)—and that to bring a party within the protection of the fifth section, the transaction must be strictly a deposit or pledge, and that a *sale*, fraudulent on the part of the factor as against his principal, cannot be converted into such a deposit or pledge as to give a lien to the purchaser.(10)

This fifth section has also given rise to a point of some importance. A broker, under liabilities for his principal, pledged, without his knowledge, India warrants and goods, for advances to meet those liabilities, at the same time communicating to the pledgee the name of the real owner. The principal having subsequently taken up the broker's acceptances, and thereby released him from his liabilities, claimed from the pledgee the goods and warrants, which the latter refused to deliver, unless on repayment of his advances, the broker having, in the meantime, become bank-

(8) ‡ *Taylor* v. *Truman*, Lloyd & Welsby, 184. 1 Moody & M. 453. ‡

(9) ‡ Ibid. ‡ (10) ‡ *Thompson* v. *Farmer*, 1 M. & M. 48. ‡

rupt. The question was, whether, under the fifth section, the pledgee had any and what lien; and it was resolved by the court, that he did by the pledge acquire all the right which the broker himself then had—that the then right of the broker was a right to an indemnity against the outstanding acceptances, and therefore conditional—that if the acceptances had not been taken up when due, the right would have become absolute in the broker, supposing no pledge to have been made, and by consequence in the pledgee, to whom they had been so transferred—but that on discharge of the liabilities, as the right of the broker would have expired had there been no pledge, so in the existing case would the right of the pledgee, which was, by the express words of the statute, the *same* right transferred.(11)

In a subsequent case, nearly the same point arose before Chief Justice Best at Nisi Prius, who also directed the jury to find against the claim of the pledgee. But his lordship seems to have decided on another ground, and one which, with great deference, is hardly maintainable; for he was of opinion, that the pledgee, even during the continuance of the liabilities, *never had any lien at all*, because, as his lordship observed, the only right which he could acquire under the fifth section of the statute, was such a

(11) ┼ *Fletcher* v. *Heath*, 7 B. & C. 517. ┼

right as the pledgee could *himself have enforced at that time;* and as the right was then contingent, it was clear that it could not have been enforced by him against his principal.(12) His lordship, however, seems to have given too narrow a construction to the words on which he relied; for although the right to indemnity, which a factor under liabilities for his principal undoubtedly has, is not a right which he can *actively* enforce, yet it is manifest that he may render it efficacious, or, in other words, *put it in force*, by retaining the property of his principal until the liability is discharged; and such right, therefore, he may also, under the provision of the fifth section, transfer to a pledgee.

In a recent case it was contended, among other things, that the delay of the principal in making known that he was owner to a pledgee, who had taken goods without notice, was a confirmation or adoption of the pledge. Upon which Lord Tenterden, in giving judgment, observed, that he could not understand how a mere nonfeasance could be an act of confirmation, unless it were followed by certain consequences. If it had appeared that the consequences of his forbearing to give notice had been an alteration in the defendant's situation for the worse, or even of his own

(12) *Blandy* v. *Allan*, Dan. & Lloyd, 22.

for the better, there might have been ground for the argument.(13)‡

But the rules neither of the common law nor of the statute affect the transfer of negotiable securities or instruments, in which the property passes by delivery alone, such as navy bills, or bills of exchange indorsed in blank.(*p*) For it has been held that indorsed bills deposited with a banker for the purpose of being received when due, if pledged by the banker for his own debt, cannot be followed by the owner into the hands of the pledgee.(*q*) For with respect to instruments of this description the title of a bonâ fide holder is derived from the instrument itself, and not from the title of the person he received it from;(*r*) and therefore the only question is as to the fairness of the transaction. And though bankers be [are], as between themselves and

(13) ‡ *Robertson* v. *Kensington*, Lloyd & Welsby's Merc. Cases, 187. In that case an application was afterwards made to the court on behalf of the plaintiff (the owner of the goods), to allow the damages to be increased by adding to the value of the goods the amount of rent and other expenses paid, or to be paid, to the East India Company, in whose warehouses the goods had been deposited; which application was granted. Ibid. note. ‡

(*p*) *Goldsmid* v. *Gaden*, 1 Bos. & Pull. 649; *Collins* v. *Martin*, ib. ante.

(*q*) *Collins* v. *Martin*, 1 Bos. & Pull. 649. (See ante.)

(*r*) 1 Burr. 452. 3 Burr. 1516. Salk. 126. 3 Atk. 56. *Peacock* v. *Rhodes*, Doug. 633; ‡ *Beauchamp* v. *Parry*, 1 B. & Ad. 89; Lloyd & Welsby, 334, per Parke, J. ‡

their customers, considered for some purposes as factors,(*s*) yet, as to third persons, there is an essential distinction between goods of which the property and possession may be in different persons, and bills of exchange, in which, for the purpose of rendering them negotiable, the right of property passes with the bills.(*t*)

‡The following instruments have been considered as possessing the quality of negotiability by mere delivery. Bank notes(13)—bills of exchange payable to bearer(14)—or indorsed in blank(15)—promissory notes(16)—exchequer bills in blank(17)—and it should seem navy bills also.(18) But East India bonds (which can only be put in suit by the original obligee), however by usage transferable, are not in law negotiable.(19)

The negotiability of English mercantile instruments is to be decided by the court,(20) but it

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(*s*) Ante, p. 89, 90.

(*t*) See the judgment given by C. J. Eyre, 1 Bos. and Pull. Rep. 651.

(13) ‡ *Miller* v. *Race*, 1 Burr. 452; *Clarke* v. *Shee*, Cowp. 200; *Solomons* v. *Bank of England*, 13 East, 135, n.; *Lowndes* v. *Anderson*, 13 East, 130. ‡

(14) ‡ *Grant* v. *Vaughan*, 3 Burr. 1516. ‡

(15) ‡ *Collins* v. *Martin*, 1 Bos. & Pull. 649; *Peacock* v. *Rhodes*, Doug. 636. ‡

(16) ‡ Ibid. ‡

(17) ‡ *Wokey* v. *Pole*, 4 B. & A. 1. ‡

(18) ‡ *Goldsmid* v. *Gaden*, cited in *Collins* v. *Martin*. ‡

(19) ‡ *Glynn* v. *Baker*, 13 East, 509. ‡

(20) ‡ *Grant* v. *Vaughan*, ante. ‡

seems from a recent case, that the question as regards foreign instruments must be determined on evidence by the jury. The question arose out of a fraudulent pledge by a broker of certain bordereaux and coupons, entitling the holder to dividends in Neapolitan stock. These documents contained on the face of them a reference to certain certificates, which alone could convey a title to the principal stock, although on presenting the bordereaux, coupons might always be obtained for the dividends. In the present case, the certificates had not been pledged with the other documents, and Tindal, C. J., left it as one question for the jury, whether the bordereaux and coupons without the certificates were negotiable in the English market by delivery alone, which the jury answered in the negative. On a subsequent argument upon the propriety of this direction, the whole Court were of opinion that the Chief Justice was right.(21)

In a previous case, where an agent had improperly pledged a Prussian bond of his principal, by which bond the King of Prussia declared himself and his successors bound *to every person who should for the time being be the holder of the bond*, for the payment of the principal and interest, evidence was given that such instruments were

(21) ‡ *Lang* v. *Smyth*, 7 Bingh. 284. ‡

commonly negotiable in the English market by delivery alone, and the jury having found a verdict in favour of the holder, the Court of King's Bench refused to disturb it.(22)

Instruments which are ordinarily negotiable, may have their currency restricted by the act of the holder. A bank post bill cannot be circulated without the indorsement of the payee, and a bill of exchange may, by a particular direction upon the bill, be limited to special purposes; in which case the party taking it from the next immediate holder, whether by way of pledge or upon discount, takes it subject to the uses so declared, and is accountable to the person by whom it was restricted, in case of any misapplication of the proceeds.

Two cases, both of considerable importance, will illustrate this proposition. Two bills of exchange were paid to De Roure, the agent of Messrs. Treuttell and Wurtz, indorsed as follows: "Pay to J. P. De Roure, Esq., or order, for account of Messrs. Treuttell and Wurtz." These bills were deposited by the agent with Barandon and Co. as a security for past and future advances made by them to him, and on the bankruptcy of the agent were claimed by Messrs. Treuttell and Wurtz. An action having been brought to enforce the

(22) ‡ *Gorgier* v. *Mieville*, 3 B. & C. 45. It does not, however, appear in this case that the court treated the negotiability as other than a question *for the court.* ‡

claim, the court decided that by the form of the indorsement the negotiability was restricted, and that Barandon and Co. could not withhold the bills from Treuttell and Wurtz, whose property they must have known them to be.(23)

The other case was as follows: —A foreign bill was transmitted by the principal in America to his factor in England, thus indorsed: "Pay Samuel Williams, or order, for my use." This bill the agent discounted with Jones, Loyd and Co., bankers in London, and misapplied the proceeds, whereupon the principal sued the bankers for money had and received to his use. The case underwent considerable discussion both in the King's Bench, where the action was originally brought, and afterwards in the Exchequer Chamber, into which court it was carried on appeal. And the judges were unanimously of opinion, that the plaintiff ought to recover, inasmuch as by the operation of the restrictive words, "to my use," the bill could not be negotiated without imposing on the next immediate holder the responsibility of seeing that the proceeds were properly applied; and they held, that the words "or order," although apparently giving to the indorsee the right to negotiate, were not sufficient to control the manifest intention indicated by the other expression.(24)↓

(23) ↓ *Treuttell* v. *Barandon*, 8 Taunt. 100. |

(24) ↓ *Sigourney* v. *Loyd*, 8 B. & C. 622. Dan. & Lloyd, 132; *Loyd* v. *Sigourney*, 5 Bingh. 525. ↓

And the negotiability even of money or notes does not prevent their being followed in cases of fraud to which the receiver is a party, provided they can be traced.(*u*) (25)

† Nor even where there has been no fraud, if due caution has not been exercised in the taking of the instrument. For it is now well settled, that if bills, checks, or notes, are taken under circumstances which were calculated to excite a reasonable suspicion that the holder could not honestly dispose of them, the party so taking them cannot hold them against the person really entitled.

Thus, without adverting to many other decisions by which this position is established,(26) in the

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(*u*) Lottery tickets are not within the exception in favour of negotiable instruments, and therefore where a lottery ticket was deposited by A. with a banker to receive the money upon it, and was delivered by him to B. instead of his own, A. recovered against B. in an action of trover for the ticket. *Ford* v. *Hopkins*, 1 Salk, 284. See the observations made upon this case by Lord Mansfield, 1 Burr. 452. See *Turner* v. *Cruikshank*, cited Ambl. 187. A subscription receipt in South-Sea Stock for 1000*l.* was delivered by the plaintiffs, with whom it had been deposited, to another person, by mistake for one of the same value, and the defendants recovered in trover against the plaintiffs, who filed a bill for relief, which was first denied by the Master of the Rolls, but granted by Lord Macclesfield. † And see *Glynn* v. *Baker*, 13 East, 509. †

(25) † *Solomons* v. *Bank of England*, 13 East, 135, n. †

(26) † *Gill* v. *Cubitt*, 3 B. & C. 466; *Snow* v. *Peacock*, 3 Bingh. 408; *Down* v. *Halling*, 4 B. & C. 330; *Slater* v. *West*, Dan. & Lloyd, 15; and see the note. *Strange* v. *Wigney*, 6 Bingh. 677; Lloyd & Welsby, 337. †

case beforementioned of *Smyth* v. *Lang*, one of the questions left to the jury was this: whether the defendant had acted with proper caution in taking the bordereaux without requiring the certificates to which they referred; and the jury having found in the negative, the other judges, before whom the case was afterwards brought, were of opinion, that the circumstance of the bordereaux and coupons being separately pledged, was a circumstance which, with a careful man, ought to have excited inquiry, and that the direction in this respect also was right.(27)⊥

3. If a factor have an absolute power to sell, an indorsement of a bill of lading by him while the ship is at sea, provided it be by way of sale and not of pledge, passes the property, and divests the principal's right to stop in transitu.(*x*) And in the absence of fraud it seems that the assignee's knowledge of the factor's character would not affect his title; for, in order to make notice material, it must be notice of something inconsistent with the right of the assignor to do the act under which the assignee claims, or of such circumstances as render the bill of lading not fairly and

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(27) ⊥ 7 Bingh. 284. ⊥

(*x*) Per Lord Mansfield, *Wright* v. *Campbell*, Burr. 2051. This appears to have been taken for granted in the case of *Newsom* v. *Thornton*, 6 East, 41. In the case of *Hunter* v. *Baring*, also cited 6 East, 39, the same doctrine seems to have been held by Lord Kenyon; and see *Dick* v. *Lumsden*, Peake, N. P. 190.

honestly assignable:(y) but inasmuch as the character of a factor is consistent with the power to sell, the knowledge of this circumstance would not probably be considered as any impeachment of the transaction, if it would be otherwise valid.

In order to empower a factor to sell goods consigned to him, he is usually furnished with a bill of lading indorsed to him by the consignor, and this is the only regular transfer;(27) but a letter of advice may be sufficient against a party privy to the whole transaction. As where the owner of goods consigned them to his factor for sale, and also a bill of lading *not indorsed*. Afterwards, when he was informed by the factor of the want of an indorsement, he answered by letter that it was a mistake, and he would send an indorsement, upon which the factor sold the goods; but not being able to take up the bills drawn upon him by the owner, the latter sent the indorsed bill to another person who had paid the bills for

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(y) *Cumming* v. *Brown*, 9 East, 516.

(27) ┼ Whether the mere indorsement of the bill of lading by a principal to his factor will transfer the *property* in the goods is very doubtful. As regards third parties, who take by assignment from the indorsee bonâ fide and in a transaction of sale, it will, no doubt, have this effect; but it has been made a question, whether the factor can, by virtue of the assignment, maintain an action of trover (which implies a right of *property*) against one who has wrongfully got possession of the goods. *Coxe* v. *Harden*, 4 East, 241. ┼

the honour of the drawer, with full knowledge of all the transaction. In an action brought by him against the purchasers, Lord Kenyon declared, that though amongst persons ignorant of the circumstances, an indorsement is the only transfer, yet that a letter of advice was sufficient where the parties knew all the circumstances, and the plaintiff was therefore nonsuited.(z)

4. A factor whose employment requires him to transmit goods to his principal in a foreign country, has power to bind those goods for the freight. The rule, as stated by Molloy, is, If a factor enter into a charter-party with a master for freightment, the contract obliges him; but if he lade aboard generally, the goods, the principals, and the lading, are made liable, and not the factor, for the freightment.(a) But if a merchant allow a certain sum to the factor for carriage, and the factor on his own account execute a charter-party for the hire of a ship, the merchant or the goods are only liable for the *freight*, and not for the whole hire of the ship.(b)

(z) *Dick* v. *Lumsden*, Peake, N. P. 189. ✝ But in general the transfer by a factor of an *unindorsed* bill of lading, even on a bonâ fide sale, will not pass the property. *Nix* v. *Olive*, Abbott on Shipp. 5 ed. p. 393. ✝

(a) 2 Moll. 331; 2 Atk. 622.

(b) *Paul* v. *Birch*, 2 Atk. 622.

SECTION 7.

How far a joint Employment makes the Employers jointly liable.

It is alleged by Molloy, "that where one and the same factor acts for several merchants in the same transaction, they must run the joint risk of his actions, though they be strangers to each other; as if five merchants remit to one factor five distinct bales of goods, and the factor make one joint sale of them to one man, who is to pay a moiety down, and the other at six months' end; if the vendee break before the second payment, each man must bear an equal share of the loss.(*a*) However, if such a factor draw a bill upon all those five merchants, and one of them accept it, the others are not bound.(*b*)

It has been decided, that where several persons employ a broker to buy one lot of goods, each being to take an aliquot part, but without any mutual interest in the re-sale, this does not make them partners.(*c*)

(*a*) 2 Moll. 328.

(*b*) *Pinckney* v. *Hall*, Salk. 126; 1 Ld. Raym. 175.

(*c*) *Hoare* v. *Dawes*, Doug. 356. Although this was not a case between the vendors and vendees, yet the point here stated is that which is considered to be decided by it in *Coope* v. *Eyre*, 1 H. Bl. 45; see particularly the judgment of Mr. J. Heath in the last case.

SECTION 8.

Principal how discharged.

1. Where credit has been properly given to an agent on a purchase for the use of the principal, the vendor has in general a right to come upon the latter for payment, without regard to any transaction or account between the principal and the agent. Therefore no private agreement, by which it is stipulated between the principal and agent that the latter only is to be answerable to the seller, can affect the right of the latter. A covenant by the master of a ship with the owners, that he should be at the cost of the repairs, does not discharge them from their liability for repairs done by his orders.(a) Nor is it any defence to an action against a master for articles sold for his use to a servant, that by agreement with the master the servant for a certain sum contracted to furnish those articles.(b) So that a vendee by paying his own broker does not discharge himself from the demand of the vendor, unless the latter, by giving credit to the broker, induces [induce] the principal to believe that he is released. In an action for goods sold and delivered, the facts were, that the plaintiffs sold the goods to K. & Co., to be taken away in one month, and paid for in a month

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(a) *Rich* v. *Coe*, Cowp. 636.
(b) *Precious* v. *Able*, 1 Esp. Cas. 350.

from the sale. K & Co. were really brokers for the defendant; but that was not known to the plaintiffs till some time after the sale. K. & Co. became insolvent before the expiration of the month, the defendants having previously paid them the price of the goods. It was contended for the defendant, that though in general, upon a sale to a broker, the vendor may come upon the principal when discovered, the doctrine must be taken with this qualification, that the principal has not previously paid the price of the goods to the broker. But Lord Ellenborough said, "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is not affected by the state of accounts between the two. If he let the day of payment go by, he may lead the principal into the supposition that he relies solely on the broker; and if in that case the price of the goods have been paid to the broker on account of this deception the principal shall be discharged. But here payment was demanded on the day it became due, and no reason was given the defendant to believe that his broker alone was trusted:" and accordingly a verdict was directed for the plaintiff. (c)

(c) *Kymer* v. *Suwercropp*, 1 Campb. 109. *Speering* v. *Degrave*, 2 Vern. 643. A. as master of a ship of which the defendants were owners, bought several goods of the plaintiffs. A. failed, and on a bill to compel the defendants to pay, they insisted that

For the same reasons a principal cannot, under these circumstances, protect himself by setting up a balance due to him from his own broker. (*d*)

What is here said does not affect the case of servants to whom money is paid *in advance* to purchase goods with, and who, notwithstanding, are allowed by the sellers to deal upon credit; in such cases, the credit itself being unauthorized by the masters, they are not liable. (*e*) But it was observed, that if the master justify the credit given to the servant at all, he is not then discharged by paying the price to the servant, if the latter omit to pay it over to the creditor: (*f*) and the authorities already referred to upon that part of the subject may serve to illustrate the present.

2. It was before hinted, that in all these cases, where the principal, notwithstanding his having paid his own agent, would remain liable, yet the vendor may, by his conduct in giving credit to the agent, discharge the principal of that liability. Thus although the owners of a ship be liable for the master's contracts, notwithstanding any private agreement between them by which

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A. only was liable, because he had money from the part-owners to pay the plaintiffs; but the Court held that A. was but a servant to the owners, and where a servant buys the master is liable; and though the owners paid their servant, yet if he pay not the creditors, they must stand liable.

(*d*) *Waring* v. *Favene*, 1 Campb. 85.

(*e*) Ante, p. 162.

(*f*) Ante, p. 162, &c.

the master stipulates that he alone shall be liable, yet if it appear that a tradesman has notice of such an agreement, and in consequence of it gives credit to the master individually as a responsible person, particular circumstances of that sort may afford a ground to say that he meant to absolve the owners, and to look singly to the personal security of the master.(*g*)

Thus also, if a vendor neglect to call upon the principal till long after the credit expires, the principal may have a right to suppose, either that the money is paid over by the agent, or that the creditor takes him for his debtor. (*h*)

| Indeed there are several ways in which the liability of the principal may be affected in purchases made by his agent, of which the following summary may be useful.

1st. The purchase may be made by the broker expressly for and in the name of his principal. In that case if the principal be debited by the seller, he only, and not the broker, will be liable. (1)

(*g*) Per Lord Mansfield, *Rich* v. *Coe*, Cowp. 637.

(*h*) Per Lord Ellenborough, ante, p. *1?, 243; see *Kendall* v. *Andrews*, 1 Esp. N. P. 115; *Stubbing* v. *Heintz*, Peake, N. P. 46. Ante.

(1) | *Kymer* v. *Suwercropp*, *Waring* v. *Favenc*, ante, and the proposition is assumed in all the later cases. It would have seemed unnecessary to add, had it not been the subject of a solemn decision, that the conduct of the seller in selecting the agent for his debtor cannot affect the relation of the latter to his principal,

2d. A broker may purchase in his character of broker for a known principal; but the seller may choose nevertheless to take him for his debtor rather than the principal, in whose credit he may not have the same confidence; and after this deliberate election, the seller cannot afterwards turn round and charge the principal. (2)

3d. The broker may buy in his own name without disclosing his principal, in which case the invoices will of course be made out to him, and he will be debited with the account. If now, before payment, the seller discover that the purchase was in fact made for another, he may, at his choice, look for payment either to the broker or the principal to the former upon his personal contract—to the latter upon the contract of his agent; and the adoption of the purchase by the principal will be evidence of the agent's authority. (3)

But 4th. If after the disclosure of the principal the seller lie by and suffer the principal to settle in account with his broker for the amount

nor convert him who was a broker for purchase into a vendor of the goods to the principal. *Seymour* v. *Pychlau*, 1 B. & A. 14.

(2) ╋ *Patterson* v. *Gandasequi*, 15 East, 62. *Addison* v. *Gandasequi*, 4 Taunt. 574. ╋

(3) ╋ *Railton* v. *Hodgson*, 4 Taunt. 576, n. Neither can the principal and agent, by any juggle or contrivance among themselves, release the former from this liability. Ibid. *Wilson* v. *Hart*, 7 Taunt. 295. ╋

of the purchase, he cannot afterwards charge the latter, so as to make him a loser, but will be deemed to have elected the broker for his debtor. (4)

And 5th. If the principal be a foreigner, it seems that, by the usage of trade, the credit is to be considered as having been given to the English broker, and that he only, and not the foreign buyer, will be liable. That question however is for the jury. (5)

6th. There is still an intermediate case, where upon a purchase by a broker, the seller knowing that he is acting as broker in the transaction, *but not for whom*, makes out the invoice to him, and debits him with the price: can the seller afterwards, when the name of the principal is made known to him, substitute him as the debtor and call upon him for payment? On the one part it is said, the principal in debiting the broker can have exercised no election, because election implies a preference, and there can be no preference when the principal is unknown. On the other part it is answered, that the seller might have known by simply asking the question, and that the omitting to make the inquiry is decisive evidence of a deliberate preference of the broker. The Court of King's Bench has decided that the principal

(4) Ante.

(5) *Addison* v. *Gandasequi*, and see *Thomson* v. *Davenport*, 9 B. & C. 28; Dawson & Lloyd, 278.

in such case is *not* discharged, but the decision has not been considered very satisfactory, and is certainly not implicitly acquiesced in. (6)

7. It was laid down by Parke, J. in a case which underwent much consideration, that wherever the broker has stated to his principal, and the latter has bonâ fide adopted a contract different from that under which the purchase was

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(6) ╡ *Thomson* v. *Davenport*, ante. The judgment of Lord Tenterden in this case was as follows:—" The general rule is, that if a person sells goods to another on the supposition that he is dealing with him as a principal, and subsequently discovers that that person is but the agent of another, (the state of account not having been varied in the meantime so as to prejudice the latter,) he may resort to the principal for payment, even though he have previously debited the agent. On the other hand, if at the time of the sale the seller knows that the person dealing is not the principal, and *knows who the principal is*, yet selects the agent for his debtor, then, according to the cases of *Patterson* v. *Gandasequi*, and *Addison* v. *Gandasequi*, he cannot afterwards have recourse to the principal. The present is a middle case. The plaintiffs below [the sellers] were informed that the purchaser was buying for another. They might indeed have made inquiry who that other was, but, in fact, they did not know the principal. It seems to me therefore that the case falls within the first proposition. There may be another exception; and it is this: Where an English merchant is buying for a foreigner it is universally understood among commercial men, that credit is given to the English buyer. Here the principal lived at Glasgow; and it might have been a fair question whether, by the usage of Liverpool [where the sale took place,] the credit must be supposed to have been given to the English dealer. But that point was not raised, and no such evidence was given."

Among the dissentients from this decision is Mr. Justice Parke. ╡

actually made, the seller cannot call upon the principal for payment; because the seller sues on the contract under which the goods were really sold, and is therefore bound to show that the principal authorized or ratified *that contract*, and not a different one substituted by the broker. And although the court hesitated to adopt this proposition in its full extent, yet they were unanimously of opinion, that if the seller have furnished the broker with the means of so misrepresenting the contract to his principal, and the latter have actually paid the broker according to the terms communicated to him, he will thenceforth be released from all liability to the seller.(7)

8. Payment by the agent will of course discharge the principal. And it is a general principle, that if the creditor voluntarily give an enlarged credit to the agent of the debtor, or adopt a particular mode of payment, whereby the principal is placed in a worse situation than he would otherwise have been, the liability of the original debtor is discharged; and therefore if a creditor voluntarily and for his own accommodation take a *security* from an agent of the debtor, who afterwards fails, having in his hands funds of his principal adequate to the payment of the demand, he cannot afterwards resort to the prin-

(7) ‡ *Horsfall* v. *Fauntleroy*, 10 B. & C. 755; Lloyd & Welsby, 340. ‡

cipal.(8) But if the creditor take the security, not voluntarily and for his own convenience, but because he is unable at the time to procure cash, or if he take it conditionally, and not as absolute payment, or if the principal be in no respect prejudiced by the accommodation afforded to the debtor, then to whatever extent the indulgence may have been carried, the principal will not be released. It seems, in short, that nothing will operate as a discharge to the principal which could not be pleaded as payment, or as accord and satisfaction between the creditor and the agent.(9) ⸸

(8) ⸸ *Strong* v. *Hart*, 6 B. & C. 160; *Smith* v. *Ferrand*, 7 B. & C. 19. In the first of these cases the captain of a ship had taken a bill from the consignees (agents of the consignors) in payment of the freight, which being afterwards dishonoured, the shipowners sued the consignors. And it was held that the Chief Justice had properly directed the jury to find for the defendants if they thought that the captain took the bill voluntarily, and for his own convenience, without insisting upon payment in cash; and for the plaintiffs if they thought that the captain took the bill, because he could not obtain payment in cash. In the other case, the seller of goods received from the purchaser an order on his banker for the price, deducting six months' discount, and the latter, with whom money had been deposited to meet that and certain other demands, offered to pay in cash, deducting the six months' discount, or, in part, by a bill upon a third person at three months, which bill the seller elected to take; and the bill being afterwards dishonoured, it was held that he could not sue the purchaser for the price of the goods. ⸸

(9) ⸸ *Tapley* v. *Martens*, 8 T. R. 451; *Marsh* v. *Pedder*, 4 Campb. 257; *Everett* v. *Collins*, 2 Camp. 515; *Robinson* v. *Read*, 9 B. & C. 449. In the first of these cases the carrier took

"And therefore a *receipt* given by the creditor to an agent or broker does not necessarily of itself

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a bill from the consignee for the freight, and on its being dishonoured, sued the consignor; and as it did not appear that he had the choice of taking cash from the consignee, it was held that the consignor remained liable. The same point was determined in the case of *Marsh* v. *Pedder*, where a bill had been taken from the agent of the freighter. "The defendants," said Chief Justice Gibbs, "must still pay the freight, unless in point of law the whole had been already paid. Now suppose the defendants themselves had paid the plaintiff partly in cash and partly by a bill of exchange, which turned out to be good for nothing, it seems to be admitted that they would not be discharged. The result is the same where the payment is made by an agent. If the bill is not paid, the principal remains liable. Circumstances may vary the effect of taking a bill of exchange either from the agent or the principal. If the party having the offer of cash, merely for his own accommodation prefers a bill of exchange, upon that he must seek his remedy." In *Everett* v. *Collins* the creditor elected to take a *check* from the agent rather than cash, and yet on the dishonour of the check the seller was permitted to recover from the principal. But the circumstances of that case were peculiar. Lord Ellenborough considered the person by whom the check was given as merely the *servant of the debtor for the purpose of payment*, and the check, therefore, as the check of the latter, in which view it was clearly no payment. *Robinson* v. *Read* is, perhaps, the strongest case. A tradesman having supplied goods to a ship, sent in his account to the owner's agent and ship's husband, and took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit, and when the bill became due, consented to a renewal of it, adding interest, and in like manner took a third acceptance which was dishonoured: the agent soon afterwards failed, the balance in his hands in favour of his principal, the ship-owner, having, during all this time, exceeded the amount of the bill, *which fact, however, was not known to the principal, who had never inspected the agent's accounts;* and it was held that the liability of the ship-owner was not discharged by these dealings

operate as a discharge to the principal; nor has it that effect unless the principal appear to have dealt differently with his agent in consequence of the receipt, as by passing it in his accounts, and giving him further credit upon the faith of that voucher.(*i*) But where the receipt is the means of accrediting the agent with his principal, or altering the situation of the latter, the creditor can only resort to the agent.(*k*) Accordingly, in the insurance trade, where the usage is for the broker of the assured to charge his employer with premiums as paid to the underwriter, though in fact there be no money paid, but a running account kept between the broker and underwriter, it is held that the receipt in the policy whereby the underwriter confesses himself paid the pre-

with the agent. "It does not appear," said Lord Tenterden, "that the defendant *sustained any injury* in consequence of the plaintiff's having taking the bill from the agent. He never looked into the accounts, nor inquired how the agent was using the money. Then the single question is, whether the agent *has paid the debt*." And Parke, J., added, "It is clear that the debt was originally due from the defendant to the plaintiff. The defendant, therefore, was bound to make out in evidence such an answer as could have been pleaded. Could the transaction in question have been pleaded as *payment?* Clearly not; for unless a bill is taken by choice instead of cash, it is not equivalent to payment. Then could it be pleaded as *accord and satisfaction?* There may be some evidence of that, but not sufficient to warrant our drawing such a conclusion."

(*i*) *Wyatt* v. *Marquis of Hertford*, 2 East, 147; Ambl. 269.
(*k*) 3 East, 157; Ambl. 269.

mium, is conclusive as between him and the principal.(*l*)

[But if it appear that a fraud has been practised upon the underwriter, by a collusion between the broker and assured, the underwriter may maintain an action for the premiums against the assured, notwithstanding the receipt on the policy.(18)]

(*l*) *Dalzel* v. *Mair*, 1 Campb. 532. That a receipt does not of itself preclude evidence of the money not having been actually paid, see 2 P. Wms. 295; 1 P. Wms. 83, note 1; 2 Eq. Ca. Ab. 742; 2 T. R. 366. In the cases therefore where a receipt would not protect the principal, it would not be a bar to a demand upon the agent.

(18) [*Foy* v. *Bell*, 3 Taunt. 493; and *Maror* v. *Simeon*, ib. 497, n.]

PART II.

Having thus briefly treated of the contracts of agents, we come in the next place to consider how principals are affected through the medium of their representatives, in matters *connected with* those contracts.

Those who deal with an agent authorized to bind his employer by his contracts, must, for all purposes connected with such dealings, consider themselves as dealing with the employer himself; and therefore the latter is not only bound by the contract itself, but is affected by the representations or admissions of his agent, or by his knowledge, in the same manner as he would [be] by his own. It may be proper, therefore, to consider distinctly the effect, first, of those representations made by agents which are deemed a part of the contract virtually entered into by the principal; secondly, the effect of notice to agents as affecting their employers with the consequences of personal notice; and, thirdly, the force of admissions made by agents as being equally conclusive with those made by the principal himself.

SECTION 1.

Representations, &c. of Agents.

1. Representations made by an agent accompanying a contract entered into with him, affect the principal as part of the contract.

But to have this effect, they must be such as are made in the course of his employment about the particular contract in question. Thus, in an action for selling coals short of measure, evidence was given of the representations of the defendant's manager and agent as to the coals then upon sale, which formed the ground of the action; but what he might have said on another occasion, or respecting another sale, would not have been admitted.(*a*) (1)

† It has been already seen that a warranty given on the sale of a horse by a servant, ordinarily employed to sell, is binding upon the master;(2) † but to affect an employer with a warranty made by his agent on a sale, it must be made at the time of the sale, † or must be connected by direct reference with the sale. † Thus an agent, employed to sell a horse, stated the

(*a*) *Peto* v. *Hague*, 5 Esp. 135. See post.

(1) See on this subject Mr. Phillips' Treatise on Evidence, 7 ed. p. 99, et seq.

(2) † *Alexander* v. *Gibson*, 2 Campb. 556, ante. †

age to the buyer at the time of showing the horse: but nothing was then said as to the price. It was held, in an action upon the warranty of age, that there being no complete contract of sale at the time of making the statement, for want of a price being fixed, it did not amount to a warranty by the agent at the time of the sale, so as to bind the master.(*b*) But where a sale is made under written particulars, the verbal declarations of the agent or auctioneer at the time of sale are not admissible to contradict the particulars.(*c*) (3)

In contracts of *insurance*, where the mis-statement or suppression of any fact which could influence the judgment of the underwriter goes to

(*b*) *Helyear* v. *Hawke*, 5 Esp. 72. ‡ And see 2 Ld. Raym. 1120; 1 Str. 414; Dyer, 76. a; Cro. Jac. 197, 630; 1 Roll. Abr. 96; 1 Salk. 211; 5 Dow, 164; 1 Camp. 361; 3 Camp. 523; 5 B. & A. 240; 1 Ry. & M. 136, 290. The proposition in the text is a general rule applicable to all representations, whether made by the party himself, or by his agent, as connected with the contract. ‡

(*c*) *Gunnis* v. *Erhart*, 1 H. Bl. 289. (*Powell* v. *Edmunds*, 12 East, 6; *Howard* v. *Braithwaite*, 1 Ves. & Bea. 210; *Jones* v. *Edney*, 3 Camp. 285, S. P.)

(3) [Although the verbal declarations of an auctioneer at the time of sale be not receivable in evidence to contradict the printed particulars; yet where personal information is given to the purchaser of a mistake in the particulars, there might in such case be room for the admission of such evidence. *Ogilvie* v. *Foljambe*, 3 Merivale, 53.] ‡ In what cases verbal statements made before the completion of a contract, which is afterwards reduced into writing, can be received in evidence, see *Pickering* v. *Dowson*, 4 Taunt. 779, per Gibbs, C. J.; *Kain* v. *Old*, 2 B. & C. 634, per Abbot, C. J. ‡

the foundation of the contract itself, it is not less fatal to the right of the party claiming the benefit of the insurance, that the error was produced by the act of his agent, than if it had been wilfully occasioned by himself: and therefore the most explicit disclosure by the assured to his agent, of all the facts within his knowledge,(*d*) with the intention that they should be communicated to the insurers, will not assist his right to recover, if any part of that intelligence, or of what the agent may be in possession of from other sources, if material, have been withheld.(*e*) It may be sufficient to illustrate this doctrine by the case of *Fitzherbert* v. *Mather*,(*f*) from which it appears, that although both the assured and the person actually effecting the insurance are ignorant of the fact concealed or mis-stated, yet if the truth be known to an intermediate agent concerned in the transaction, it will vitiate the policy. In that case, which was an action by the assured against the underwriters on a voyage from *Hartland* to *Portsmouth*, the plaintiff had given an order for corn to *Thomas*, a corn factor at *Hartland*, who shipped it accordingly for *Portsmouth*, where the plaintiff resided; and the same day advised the plaintiff and another person, the

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(*d*) *Seaman* v. *Fonnereau*, Str. 1183; *Roberts* v. *Fonnereau*, Beawes, 266; post, 259, n. (*g*).

(*e*) Park. 207, 209.

(*f*) 1 T. R. 12.

plaintiff's correspondent in *London*, of the ship's sailing. The latter person, by the plaintiff's direction, which he received on the same day with the first advice, insured the voyage from *Hartland* to *Portsmouth*. At the time the letter was written by *Thomas*, containing advice of the ship's sailing from *Hartland*, she had really sailed, and was in safety as stated in that letter; but before the letter left *Hartland* for *London*, and in time to have sent advice by the same post, it was known to *Thomas* that the ship had struck upon *Hartland* pier, and was lost. Upon these facts, it was held that the policy was void; for the underwriter, upon the faith of *Thomas*'s letter, was warranted in supposing that the ship was safe at the latest moment at which the letter could have left *Hartland*.

It was there said, that the principal must be taken to know whatever the agent knows; for where one of two innocent persons must suffer by the fraud or negligence of a third, the question is, which of the two gave credit? and therefore the plaintiff having trusted *Thomas* was bound to take the consequences. (g) (4)

(g) *Roberts* v. *Fonnereau*, 1 T. R. 16, cor. Lee, C. J. Trin. 1742. A letter being received that a ship sailed from *Jamaica* for *London* on the 24th of November, after which insurance was made, and the agent told the insurer that the ship sailed the latter end of December, this was held a fraud, and verdict for the defendant. Beawes, 266.

(4) ‡ And this, on the plainest principles of equity. The

Upon the principle that whatever is known to the agent must be taken to be known to the principal, it is immaterial through what channel the fact concealed happens to be known to the agent.(*h*) In the case of *Stewart* v. *Dunlop*, the clerk of the assured was proved to have had conversation the day before the insurance with a person who was acquainted with the loss of the ship. And though the clerk swore that he had not received any hint of the loss in that conversation; yet the Court of Session in Scotland, presuming that some intimation had been given to the clerk of the ship's loss, decreed the policy to be void; and their decree was confirmed by the House of Lords.(*i*)

As the concealment of a material fact invalidates the policy, *à fortiori*, the representation of one which is false has the same effect; and it makes no difference that the misrepresentation is without fraud, and that the fact alleged is true in the belief of the agent making it.(*k*)

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question is, what contract would the underwriter have entered into if he had known those circumstances? A man cannot adopt another as his agent for making a contract, and repudiate his responsibility for the conduct of the agent in making it. ‡

(*h*) *Seaman* v. *Fonnereau*, Str. 1183.

(*i*) Park. 209.

(*k*) *Fillis* v. *Brutton*, Park. 182. "There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent, as in the case of one who insured a life, and affirmed it to be as good a

But in order to have this effect upon the policy, the misstatement must be at the time of underwriting the policy; for where, on a former occasion, viz. when the slip was subscribed, the ship was described by the broker as American, but no such representation was made at the time of subscribing the policy; the broker saying generally, that it was an insurance on goods on board the *Hermon*, without describing her of any particular country, it was held that the principal was not bound by the representation; and that the policy was not void by reason of the ship not being documented as an American, (*l*) which she must

life as any in England, not knowing whether it was or was not." Per Lord Mansfield, *Bize* v. *Fletcher*, Doug. 632.

‡ The representations or concealment of the accredited agent affect the assured exactly as if made by *himself*. What amounts to a concealment of material facts sufficient to avoid a policy will be seen in the following cases: *Webster* v. *Foster*, 1 Esp. N. P. C. 107; *Willes* v. *Glover*, 1 N. R. 14; *Kirby* v. *Smith*, 1 B. & A. 672. To what extent the assured or his agent is bound to communicate spontaneously the facts within his knowledge, may be seen from the cases of *Haywood* v. *Rogers*, 1 East, 590; *Freeland* v. *Glover*, 7 East, 457; *Lynch* v. *Hamilton*, 3 Taunt. 37; *Richards* v. *Murdock*, 10 B. & C. 527; Lloyd & Welsby, 132. The opinion of the agent that the facts not communicated were immaterial, will not vary the case. *Shirley* v. *Wilkinson*, Doug. 306. And whether the omission proceed from fraud, or from mistake, or from negligence, it will still be equally fatal. See *Carter* v. *Boehm*, 3 Burr. 1905; 1 Bl. 594; and *Ratcliffe* v. *Shoolbred*, Marsh. Ins. b. 1, c. 11, s. 2. A mere *opinion* need not be communicated. *Carter* v. *Boehm*, 3 Burr, 1905; *Bell* v. *Bell*, 2 Camp. 479.‡

(*l*) *Dawson* v. *Atty*, 7 East, 367.

have been if the representation had been binding.(m) However, in a subsequent case, a representation made at the time of putting the defendant's name upon the slip, that the ship was to carry ten guns and twenty-five men, was held binding where no subsequent conversation upon the subject took place; Lord Ellenborough holding that a representation once made is to be considered as binding, unless there be evidence of its being afterwards altered or withdrawn.(n)

SECTION 2.

Effect of Notice to Agents.

If an agent come to the knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself.(a) For, upon general principles of policy, it must be taken for granted that the principal knows whatever the agent knows.(b) There is no difference between personal and constructive notice, except as to guilt; for if there were, it would produce great inconvenience, and notice would be avoided in every case by employing an agent.(c) This principle is adopted equally in law and in equity.(d)

(m) 8 T. R. 192. (n) *Edwards* v. *Footner*, 1 Camp. 530.
(a) 13 Ves. 121; 1 Ves. 62. (b) 1 T. R. 16.
(c) Per Lord Northington, Ambl. 626. (d) 4 T. R. 66.

The cases in which this doctrine is the most strongly exemplified are such as have arisen upon contracts of insurance, which have already been adverted to.(*e*) And the following authorities are conformable to the same principle. Thus in an action for fraudulently making a false representation of a person's circumstances, whereby the plaintiff was induced to trust him, it was held by Lord Kenyon to be a good defence that the plaintiff's agent, to whom the representation was made, was himself aware of the insolvency of the person in question: and the jury were directed that the falsehood of the defendant's representation could not subject him to an action at the suit of the plaintiff, if he knew from his own knowledge that the person was not to be trusted: and that it was the same for that purpose if the agent had that knowledge, for that the plaintiffs must be considered as standing precisely in the same situation as he did.(*f*)

(*e*) Ante, p. 257.

(*f*) *Cowen* v. *Simpson*, 1 Esp. Cas. 290. The cases in which the effect of notice to an agent has most frequently come in question, are such as arise upon the alienation of real property; which it may be proper briefly to refer to here. Those cases which seem to have gone the farthest upon this subject are *Brotherton* v. *Hall*, 2 Vern. 574, and *Jennings* v. *Moor*, 2 Vern. 609, which are ratified by the judgment of Lord Hardwicke, Ambl. 438. The first was shortly this: A. makes three several mortgages to B., C., and D. successively. In the last mortgage B. is a party, and agrees that after he is paid he will stand a trustee for D. Decreed that C. shall be paid before D., for all

But on a question in the Court of Chancery whether a written instrument should not be in-

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the securities being transacted by the same scrivener, notice to him of C.'s mortgage was notice to D. The second case was this: B., having notice of an incumbrance, purchases in the name of M., and then agrees that M. shall be the purchaser, and M. accordingly pays the purchase-money without notice of the incumbrance. Though M. did not employ B., nor knew any thing of the purchase till after it was made, yet M. approving of it afterwards, made B. his agent *ab initio*, and therefore shall be affected with the notice to B. See also *Attorney General* v. *Gower*, 2 Eq. Ca. Ab. 685; 1 Ch. Ca. 39; ‡ and *Sheldon* v. *Cox*, 2 Eden, 224. An agent received notes from an executor, payable to him as executor, as a security for advances made by the principal to the executor on his private account, and not in his character of executor: and it was held, that this was a notice affecting the principal, that he was dealing with the assets of an executor for purposes foreign to the trust which he had to discharge—that the principal thereby became a party to the devastavit, and liable to the consequences of it—and that he could not therefore retain the notes against parties claiming under the will. *Downes* v. *Power*, 2 Ball & B. 491. ‡

It is upon this principle that notice to attorneys or law agents employed in making purchases affects their employers. For instance, in the case of *Norris* v. *Le Neve*, 3 Atk. 28, a bill of review (which is granted upon discovery of new matter not known before the decree) was refused where it appeared that a person employed as an attorney for the petitioner, not indeed in the suit, but in an ejectment upon the same title tried prior to the decree, had in his possession, at the time of that trial, the documents from which the new matter was collected. ‡ And see *Ashley* v. *Baillie*, 2 Ves. 370. ‡

One seised in fee mortgaged and died, having devised to his younger son. The mortgagee assigned the mortgaged premises to the eldest son, upon being paid the money, and indemnified at his own request against the title of the younger son, of which he had heard. The eldest son mortgaged to B. who had ad-

terpreted differently from its apparent effect, by reason of its differing from the intent of one of

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vanced the money to pay off the first mortgage. It was proved that B.'s agent was present at the execution of the assignment by the first mortgagee, when the indemnity was required: and B.'s agent deposed that the title deeds were laid by him before counsel, who objected on the ground of the younger brother's title. Upon the question of notice to B. of the younger brother's title, it was held that there was such a general notice, either to the party or his agent, as made it his duty to inquire into the title, and that not having done so he must take the consequence. 1 Ves. 61; and see 2 Ves. 485. But notice to affect the principal must be in the same transaction, 3 Atk. 291, and between the same parties. Ib. 302. Therefore if an attorney be employed to look over a title, and by some other transaction foreign to the business in hand have notice, this shall not affect the principal. 2 Atk. 212; and see 2 Eq. Cas. Ab. 682, in marg.; ‡ 13 Ves. 120; Fitzgibbon, 207; 2 Ridgway, P. C. 394; 3 Madd. 34; 1 Turn. & R. 280. ‡

It often happens, particularly in the purchase of real estates, that the same agent is employed for both parties; and it has been uniformly held that both parties shall be intended to know whatever is in the knowledge of the agent, thus mutually entrusted by them. Each side is affected with notice as much as if different agents had been employed, Ambl. 459; and therefore one who advances money upon a void contract cannot protect himself by his ignorance of the facts, if the common agent were privy to them. *Doe* v. *Martin*, 4 T. R. 66. It is not material that the common agent was recommended by the party who benefits by the imposition. This is distinctly stated by Lord Hardwicke in a case which itself affords an instance of the rule. A woman previous to her marriage employed a person by the recommendation of her intended husband, to provide a settlement for her upon certain estates of the husband, which was accordingly made; but these estates were subject to a former incumbrance, of which the agent was conusant. A bill was filed to set the second incumbrance out of the way, and postpone it

the contracting parties, which it was alleged was known to the other, the evidence amounting only to show that his agent had such notice, was not deemed sufficient to alter the apparent meaning of the contract.(g)

Notice, in order to affect the principal in respect to a contract concluded by the interposition of an agent, must be to an agent empowered to treat, and not to one who is merely employed to carry proposals from one side to the other.(h)

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to the first, upon the ground of notice. Lord Hardwicke decreed accordingly, and said, "If the wife placed confidence in I. N., no matter on whose recommendation. If she relied enough on her husband to take his recommendation, it is sufficient." *Le Neve* v. *Le Neve*, Ambl. 436, 439.

[In a recent case, where the purchaser of an estate employed the vendor's agent, who had *actual* notice of an existing incumbrance which affected it, it was decided by the late Master of the Rolls, that such notice to the agent operated *constructively* as a notice to his employer, notwithstanding the purchase was made under the sanction of the Court of Chancery, and an infant was interested in it. *Toulmin* v. *Steere*, 3 Meriv. Rep. 210.]

(g) *Shelborne* v. *Inchiquin*, 1 Br. Ch. Ca. 351.

(h) Ib. ‡ In *Read* v. *Bonham*, 3 B. & B. 147, notice of abandonment given to an agent of Lloyd's at Calcutta, seems to have been considered by the Court of Common Pleas, (dissent. Richardson, J.) as notice to the underwriter, although the agent refused to accept it, saying, that he had no authority to do so. But see *Drake* v. *Marryatt*, 1 B. & C. 473, where the instructions from the Committee at Lloyd's to their agents are particularly set forth, in which it is expressly declared that they are not to receive notice of abandonment; and see also the observation of the Court upon the above case. ‡

Section 3.

Effect of an Agent's Declarations or Admissions.

1. The admissions of agents concerning those transactions in which they are employed, are for some purposes equivalent to the acknowledgment of the employers themselves. Thus the acknowledgment of an agent has been held to prevent the operation of the Statute of Limitations.

In one case, an agent had been constantly employed to pay for work of a certain description, and the workmen had always been referred to him; his acknowledgment within six years of a debt due for work of that description was deemed sufficient on a plea of the Statute of Limitations.(*a*) Upon the same ground, where it was proved, in an action for goods sold and delivered, that the defendant's wife usually transacted the business, and gave orders and paid for goods, Mr. Justice Buller ruled, on an issue of *non assumpsit infra sex annos*, that a promise by her within that time took the case out of the statute; declaring, that a promise by any servant or agent entrusted to transact the defendant's business would have the same effect.(*b*)

(*a*) 5 Esp. Cas. 145.

(*b*) *Palethorp* v. *Furnish*, 2 Esp. Cas. 211.

[*Anderson* v. *Sanderson*, 2 Starkie's N. P. C. 204.] ‡ Holt's N. P. C. 591: *Gregory* v. *Parker*, 1 Campb. 394. In *Clifford*

2. It is not, however, to be concluded, that the declarations of an agent have always the same force for the purpose of dispensing with proof of the fact, as the admission of the principal himself would have; though that force may always be attributed to them when they are the foundation of a contract which the agent has power to make. It has indeed been held, that a letter by an agent, to whom goods had been ordered by the principal to be delivered, acknowledging the delivery, is sufficient evidence of that fact. (c) But the authority of that decision has been questioned, and Lord Kenyon is said to have ruled the contrary in subsequent instances. (d)

The distinction between those cases in which the declarations of agents affect the principal, and those where other evidence is necessary, has lately been discussed very much at large in the

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v. *Barton*, 1 Bingh. 199, an offer by the defendant's wife to settle a demand for goods delivered at the defendant's shop, was held admissible in evidence, on proof that the wife used to serve in the shop, and was in the habit in other instances of transacting the husband's business in his absence.] [But in order to render the promise binding upon the principal, it must be made by a general agent. Thus a promise made by the book-keeper of a carrier, at the office, to make compensation for the loss of a parcel, is not binding upon the carrier, unless the book-keeper be shown to be his general agent. *Olive* v. *Eames*, 2 Starkie's N. P. C. 181.]

(c) *Biggs* v. *Lawrence*, 3 T. R. 454.

(d) Arg. *Bauerman* v. *Radenius*, 7 T. R. 665; and post, p. 270.

case of *Fairlie* against *Hastings*. In that case the fact sought to be established was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of; and in proof of this fact the plaintiff went into evidence of repeated applications to the defendant's agent for the bond, who informed him that it had been delivered to the defendant. The Master of the Rolls thought that this did not amount to evidence of the fact stated, and delivered his opinion in these terms: (*c*) "As a general proposition, what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to the agreement. Therefore if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party therefore to be bound by

(*c*) *Fairlie* v. *Hastings*, 10 Ves. Jun. 123.

the act must be affected by the words. But, except in one or other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been his agent. If any fact material to the interest of either party rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding that the agent himself must be examined (*Maesters* v. *Abram*). If the agreement were contained in the letter, I should have thought it sufficient to have proved that letter written by the agent: but if the letter were offered as proof of the contents of a pre-existing agreement, it was properly rejected."(1) This doctrine was discussed inci-

(1) [In the cases of *Langhorn* v. *Allnutt*, 4 Taunt. 511, and

dentally in *Bauerman* v. *Radenius*, (7 T. R. 663,) and in that case there is reference to another, *Biggs* v. *Lawrence*, (*f*) in which Mr. Justice Buller held, that a receipt given by an agent for goods, directed to be delivered to him, might be read in evidence against the principal. The counsel, in *Bauerman* v. *Radenius*, state that the contrary had frequently since been held by Lord Kenyon at Nisi Prius, without its ever having been questioned. That statement does not appear to have been denied upon the other side, and seems to have been acquiesced in by Lord Kenyon, who said, "that was not the point upon which the case was argued and determined;"

Kahl v. *Jansen*, Ibid. 565, the Court of Common Pleas decided, that the letters of an agent abroad to his principal, containing a narrative of the transactions in which he has been employed, were not admissible in evidence against the principal, as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also *Reyner* v. *Pearson*, Ibid. 662. In his judgment in the case of *Langhorn* v. *Allnutt*, Gibbs, J. states, and recognizes the general rule. "*When it is proved,*" said that learned Judge, "*that* A. *is agent of* B., *whatever* A. *does, or says, or writes in the making of a contract, as agent of* B., *is admissible in evidence, because it is part of the contract which he makes for* B., *and therefore binds* B.; *but it is not admissible as his account of what passes.*" And it matters not whether the fact stated be true or false, because the declaration of the agent is not admitted in evidence for the purpose of establishing the truth of the fact, but as a representation, by which the principal is as much bound as if he made it himself.]

(*f*) Ante, 268.

meaning the point that such a receipt could be admitted in evidence.

The case above alluded to, of *Maesters* v. *Abram*, as having been decided by Lord Kenyon, was an action on a sale of bark by the plaintiff to the defendant; and it being a question which party was to supply the bags, a letter from the defendant's broker, subsequent to the contract, was rejected as evidence of the defendant's having undertaken to do so, and it was required that the broker himself should be examined.(*g*) But it is material to observe that the letter was not cotemporary with the contract; for if it had, it may be collected, from what has already been observed, that it would have been binding as part of the agreement.(*h*) A distinction may be supposed to subsist between such declarations as are merely assertions of the agent, and such as are admissions of the principal made through the medium of his agent. A letter written by a clerk, whose business it was to correspond in the name of his employer, may therefore be considered as if written under the inspection of the principal, and as such entitled to the same weight as if coming immediately from him. Thus in an action of trover for a policy of insurance, a letter written by the defendant's clerk, informing the plaintiff that the policy was effected, was deemed

(*g*) 1 Esp. Cas. 375. (*h*) Ante, p. 270.

sufficient evidence of its existence, though it was proposed, on the other side, to prove that the letter was written by mistake, and that in fact the policy had not been made, which was refused. (1)

On the principle laid down in *Fairlie* v. *Hastings*, were decided the late cases of *Drake* v. *Marryatt* and *Garth* v. *Howard*. In the former a certificate of sea-damage, granted by an agent of Lloyd's abroad, was not admitted as evidence against the defendant, an underwriter and a member of Lloyd's, on the ground that the granting of the certificate was beyond the scope of the agent's authority. (2) The other was an action of detinue for plate of the plaintiff pledged to the defendant, a pawnbroker. The only evidence of possession by the defendant was a declaration of his *shopman* that "it was a hard case, for his master had advanced all the money on the plate at five per cent." The evidence was received, subject to motion; and on argument the Court were of opinion that it was inadmissible, on the ground that the transaction was not in the usual course of the defendant's business as a pawnbroker, but a common loan at legal interest, secured by a deposit of plate, and consequently that the declaration of the shopman related to a

(1) *Harding* v. *Carter*, Park. 4. (2) 1 B. & C. 473.

matter which was not in the course of his employment as shopman.(3) ⸸

SECTION 4.

Payment to and Receipts by Agents in general.

If money be due upon a *written security*, it is the duty of the debtor, if he pay it to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor.(*a*) And even the agent being usually employed in the receipt of money does not, in this instance, constitute such an authority as will secure the debtor. It has been so held in respect to money paid upon a bond, to one who usually received money for the obligee, but who had not the custody of the bond in question.(*b*) And even where the obligor had for several years paid the interest, and part of the principal, to an agent of the lender through whom the money had been

(3) ⸸ 8 Bingh. 451. This decision seems to be rather a refinement; but Tindal, C. J. observed, that hearsay evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it. ⸸

(*a*) *Hen* v. *Caisby*, 1 Chan. Cas. 93, note.

(*b*) *Gerard* v. *Baker*, 1 Chan. Cas. 94; *D. of Cleveland* v. *Dashwood*, 2 Eq. Ca. Ab. 709.

borrowed, who had not the possession of the bond, but had regularly paid the money over to the obligee, except the last payment; the obligor was adjudged to pay the last sum over again. For it was held, notwithstanding the hardship of the case, that the circumstance of the agent's having before received the interest, and part of the principal, did not imply that he had any authority to receive it; but as long as he paid it over all was well, and any one else might have paid it to the party as well as he.(*c*)

But perhaps a special authority from the obligee might be shown, which would be sufficient without possession of the security. (*d*)

If the bond remain in the hands of the agent, that circumstance is evidence of the obligee's intention to trust him with the receipt of the principal and interest, and therefore a payment to him discharges the obligor.(*e*) And if the obligee keep the bond himself, but upon the money being paid to the agent delivers him the bond for the purpose of its being delivered up to the obligor, he cannot afterwards recal it from the agent, and put it into suit; although, by reason of the

(*c*) *Wostenholme* v. *Davies*, 2 Freem. Rep. 289.

(*d*) Id., and 2 Eq. Cas. Ab. 709, in marg.

(*e*) *Whitlock* v. *Walthan*, 1 Salk. 157; *Duchess of Cleveland* v. *Dashwood*, 2 Eq. Ca. Ab. 709; but otherwise of a mortgage deed, upon which only the interest can be received by the agent, but not the principal, id. ib.

agent's insolvency, the principal never receives the money.(*f*)

The production of a bill of exchange or promissory note is in general sufficient to warrant the payment to the person who produces it. (*g*) And this without reference to the circumstance of his being the habitual agent of the same party. (*h*) But the presumption of authority from the possession of the instrument may be repelled by evidence of its being obtained by fraud, or for some other special purpose than receiving payment.(*i*)

2. With respect to debts not arising upon written securities, the authority of an agent to receive payment depends upon the same general principles as those which apply to other acts. In general it may be remarked, that payment to an agent properly authorized is equivalent to payment to the principal, in equity as well as in law.(*k*) And

(*f*) *Abingdon* v. *Orme*, 1 Eq. Ca. Ab. 145.

(*g*) *Owen* v. *Barrow*, 1 Bos. & Pull. N. R. 103, per Mansfield, C. J.; *Anon.* 12 Mod. 564.

(*h*) *Anon.* 12 Mod. 564; and see 2 Ld. Raym. 930.

(*i*) Post.

(*k*) 7 Ves. Jun. 470, and post. In *Fenton* v. *Browne*, 14 Ves. 144, on the sale of an estate, the deposit was paid to the vendor's agent. The vendee, pending a dispute about the title, applied to have the deposit paid into court, which the vendor resisted; and afterwards the agent failed. By the Master of the Rolls — "Without entering into the general question, the vendor's refusal to concur in the proposition made to pay the deposit into court throws the risk upon him, and he must bear the loss."

the fact of the authority may be proved by the agent himself.(*l*) But it may be proper to consider more particularly the effect of payments to factors and brokers, observing that the principles which govern these may generally be applied to agents of all descriptions.

SECTION 5.

Payment to Factor or Broker.

The effect of payment to, or set-off against, a factor or broker personally in discharging a debt due to the principal, may be considered under the following different circumstances. 1st, Where the agent is known to act merely as the representative of another, and no notice given by the principal to withhold payment. 2d, Where, under the like circumstances, that notice is given. 3d, Where he is permitted to treat as principal.

(*l*) 7 T. R. 480; Dr. & St. 286. Payment to an attorney in a cause is in general sufficient, even after a private countermand, 1 Bl. Rep. 85; but if the attorney derived his authority under a forged power from the supposed plaintiff, payment to him does not discharge the defendant, though he be the attorney upon record, 1 T. R. 62. Payment to the country agent, employed by the attorney on record, does not discharge the debtor; at least without production of the security. *Yates* v. *Freckleton*, Doug. 600. An agent in town, however, by taking money out of court, binds the plaintiff, though the payment into court were irregular, and notice had been given by the plaintiff's attorney to the defendants that he should not take it out, 1 T. R. 710.

1. Payment to a factor in the course of his business, and without notice from the principal, in general discharges the debtor;(a) if the usual mode of dealing warrant such payments, which is a question purely of fact. Therefore where goods had been sold by a broker (without naming the principal) to be paid "in one month, money," as it was expressed in the sale notes, and the vendee paid the broker within the month by bills which had to run beyond the month, but which he discounted immediately, the Court of King's Bench, on a motion for a new trial after a verdict obtained by the principal against the vendee, sent the case to be tried a second time, for the purpose of having it referred particularly to the jury to say whether this was a payment in the usual course of trade. And the jury, consisting of merchants, accordingly found it to be so, and consequently binding upon the principal. And though the plaintiff obtained a rule for a new trial upon a doubt whether the payment was meant to be wholly applied to the plaintiff's demand, the finding of the jury was deemed conclusive as to the part which was so applied.(b) It should, however, be observed, that if the vendee pay money to the broker on a general account, having purchased from him goods of different owners, he

(a) Cowp. 256; 2 Camp. N. P. C. 24.
(b) *Favenc* v. *Bennet*, 11 East, 38.

cannot, upon failure of the broker, apply the whole to one demand, but it must be apportioned among the several principals; and he remains liable to each for the surplus, if the sum paid were not sufficient to cover all the demands. (*c*)

╀ Payment to a known agent entrusted with the possession of goods, made in the usual and ordinary course of business, was at common law binding on the principal, unless made after countermand; and it is now expressly declared to be so by the 3d section of 6 Geo. 4. c. 94, which has been already cited.(1) That a mere depositary to keep, as a wharfinger, is not such agent as is contemplated by the act, is obvious, and has been decided.(2) But there is a material distinction between the character of a factor and that of a broker.(3) The latter, when selling for a known principal, has not, in general, authority to receive payment; and if payment be made to him, it is at the risk of the purchaser.(4)

A fortiori, therefore, a broker has no authority, after the completion of the contract, to vary the terms of it, and cannot bind his principal by re-

(*c*) *Favenc* v. *Bennet*, 11 East, 38.

(1) ╀ Ante, p. 223. ╀

(2) ╀ *Monk* v. *Whittenbury*, 2 Moody & M. 81. ╀

(3) ╀ *Baring* v. *Corrie*, 2 B. & A. 137. ╀

(4) ╀ Ibid. ╀

ceiving payment in any other mode than that which was originally stipulated.(5)

Nevertheless, if the principal have in other transactions with the same purchasers sanctioned a settlement with the broker, he will be presumed to have authorized it in the particular instance, and will be bound by it.(6)

But if he act for a principal *undisclosed*, he has authority to receive payment, and may even, it has been said, vary the terms of payment after the sale is completed, subject however to the right of the principal to interfere at any time before payment, and to rescind what has been done; "for until the principal appears, the broker is to be regarded as the proprietor."(7)

The latter branch of the proposition, however, must be considered doubtful; for in a subsequent case, where brokers acting for undisclosed principals had received payment in a mode varying from the terms of the original contract, without authority from those principals to make the substitution, Lord Ellenborough considered it ineffectual as against the principals, and peremptorily refused to receive evidence of a usage of trade sanctioning such an alteration, observing, "that it would be productive of intolerable mischief to

(5) ╀ *Blackburn* v. *Scholes*, 2 Camp. 343. ╀

(6) ╀ *Townsend* v. *Inglis*, Holt, N. P. C. 278. ╀

(7) ╀ Per Lord Ellenborough in *Blackburn* v. *Scholes*, supra. ╀

permit brokers to deviate from the original terms of the contracts."(8)

An insurance broker has authority from the assured to adjust and receive payment of a loss. But he has no authority to settle on any other terms than those of payment *in money*, and consequently if the settlement has been made by a set-off in general account with the underwriter, the assured is not bound by such settlement, and may, notwithstanding, call upon the underwriter for the amount.(9)

Still in this, as in other cases, if the assured has given a general authority to the broker to settle in such way as he pleases, or has in former instances recognized and adopted such a mode of payment, he cannot in the particular case repudiate the settlement. A mere usage, however, among underwriters, by which a settlement of losses by set-off against premiums due from the broker is deemed good payment, cannot bind the assured unless he has assented to the usage; and although several attempts have been made to import the practice at Lloyd's in this particular into the law merchant of England, the courts have invariably refused to adopt it as obligatory

(8) ╫ *Campbell* v. *Hassell*, 1 Stark. N. P. C. 233. ╫

(9) ╫ It has been already said (ante, p. 111, n. 3), that the premiums are a debt due from the broker *personally* to the underwriter. ╫

on persons not shown to be themselves members of that body, or cognizant of its laws.

The first case of this kind was that of *Todd* v. *Reid*,(10) in which the court disposed of the argument drawn from usage in the following summary judgment: "The broker, as agent of the assured, was only entitled to receive payment in money; and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another."

The attempt was renewed soon afterwards in the case of *Russell* v. *Bangley*,(11) and the usage of Lloyd's was again pressed on the consideration of the court; but as it appeared in that case that the name of the underwriter had not been struck out from the policy on the supposed settlement, the court took hold of that circumstance as decisive against the defendant, leaving the question upon the usage altogether undetermined. "The general rule of law," it was observed by Chief Justice Abbott, "is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged. In cases of insurance, *usage may possibly introduce a different*

(10) ‡ 4 B. & A. 210. ‡ (11) ‡ Ibid. 395. ‡

rule; but, at all events, an underwriter has never been considered discharged as against the assured until his name has been struck off the policy."

The qualification thus cautiously expressed, encouraged the underwriters to make a third effort in the case of *Bartlett* v. *Pentland*,(12) the defendant in which was the secretary of an Irish insurance company. Lord Tenterden in his judgment on that case thus expressed himself: "The authority given by the principal to his agent to receive money can never be construed into an authority to allow the debtor, instead of paying the money, to write off so much as may be due to the agent, for that would be to enable the debtor to defraud the principal by collusion with the agent. And if he be not authorized to allow a set-off, neither can he be authorized to strike the name off the policy, or, in other words, to do that which amounts to a release of the debt. It is said, that in *Russell* v. *Bangley* I relied very much on the fact of the name not being struck off the policy; and, certainly, there may be cases in which such a circumstance would be important; as where it can be fairly inferred that it was done with the consent or acquiescence of the assured. Here, however, there was nothing on which such a presumption could be founded. As to the supposed usage of Lloyd's—of a particular place, and a

(12) ↓ Lloyd & Welsby, 235; 10 B. & C. 760. ↓

particular class of persons, however respectable—I do not know how that can be binding on third parties, unless shown to be acquainted with that usage." The same point was again mooted in the case of *Scott* v. *Irving*,(13) and was again solemnly decided by the court against the underwriter.

In the last case payment had been made partly in cash; but the usage being that payment should be made at the expiration of a month, the assured insisted that this payment, having been made within the month, was irregular and unauthorized, and consequently not binding upon him. But the court rejected this part of the claim, on the ground that a broker had, in virtue of his general authority, a right to receive payment *in money* at any time; and they distinguished the case from the one before cited of *Campbell* v. *Hassell*, observing, that there the payment was in direct contradiction to the original contract. (14)

However, even a payment in cash to the broker will not be available against the principal, unless it were specifically applied to the particular debt. Payment on general account will not be sufficient,

(13) ⸸ 1 B. & Ad. 605. ⸸

(14) ⸸ Ibid. This decision seems, it must be confessed, somewhat inconsistent with the dictum of Bayley, J., in *Parnther* v. *Gaitskell*, 13 East, 437, that "if a purchaser pay his money to the agent of the vendor, before the time when the latter is authorized to receive it, he makes that agent his own, for the purpose of paying over the money to the right owner." ⸸

unless the principal has by his own default or delay placed the underwriter in a worse situation with the broker than he would otherwise have been in. (15)⸸

2. By the general rule of law, the sale of a factor creates a contract between the buyer and the principal, and therefore, in general, the buyer, *after notice* from the principal not to pay the factor, is not justified in doing so. (*d*) But to this there are exceptions; 1st, Where the factor or broker acts under a *del credere* commission, and the buyer gives credit to him only, as in the following case, in which, notwithstanding the rule as above laid down by C. J. Lee, (and said to have been since ratified (*e*) by Mr. J. Buller,) a special jury of merchants persisted in finding a verdict in favour of a buyer who had paid the factor after notice; alleging as their reason that no credit was given, as between the owner and the buyer, and that the latter was answerable only to the factor, and the factor to the owner. (*f*) However it may be observed that the opinion of the jury is not altogether irreconcilable with the truth of the

(15) ⸸ *Bartlett* v. *Pentland*, supra. ⸸

(*d*) Str. 1182; Bull. Ni. Pr. 130; [*Mann* v. *Forrester*, 4 Campb. 60. S. P.]

(*e*) *Escot* v. *Milward*, Co. Bl.; 1 Esp. N. P. 107; but see 7 T. R. 360, where it is affirmed that this case appeared, from a note obtained from Mr. J. Buller, by whom it was tried, to have been decided on the ground of fraud.

(*f*) *Scrimshire* v. *Alderton*, Str. 1182.

doctrine laid down by the Chief Justice, considered as a general position, for it forms part of the case, that the factor sold at his own risk; and Mr. J. Buller, treating of this case, says, (*g*) "Perhaps, under some particular circumstances, the rule there laid down may not take place: as where the factor sells the goods at his own risk, i. e. is answerable to the owner for the price, though it be never paid, for in such case he is the debtor to the owner, and not the buyer." That the circumstance of a *del credere* commission forms an exception to the rule, is also confirmed by a more recent opinion; (*h*) but this point does not appear to have been expressly decided.

[However in the case of *Morris* v. *Cleasby*, (16) this question came directly under the consideration of the Court of King's Bench, and in the previous case of *Cumming* v. *Forrester*, (17) (the judgment in which was put on another point,) that court had intimated their opinion upon the question. In the former case it was decided, in consonance with the opinion intimated in the latter, that a *del credere* commission, being a contract between the broker and his own immediate employer, could not affect or vary the rights of a third person, who was not privy to the contract,

(*g*) Ni. Pri. 130.
(*h*) Of Mr. Justice Chambre, 3 Bos. & Pul. 489.
[(16) 4 M. & S. 566.]
[(17) 1 M. & S. 494.]

nor empower the broker to set up a claim against the person dealing with his principal, as derived out of that contract.] (18)

Again; even *after notice*, and notwithstanding the buyer was apprized at the time of the contract that he was dealing with an agent, yet he will be secure in paying the factor, if the principal upon the general balance of his account be indebted to the factor. For since the factor would have a lien upon goods in his hands for his general balance, he is allowed, for the benefit and ease of trade, to have the same lien upon the price of the goods when sold. (*i*) This was established in an action brought by the assignees of a bankrupt principal against the buyer of goods from the factor, who, notwithstanding his knowledge of the factor's character at the time of sale, after the action brought, paid the price to the factor, who was proved at the trial to have a balance of accounts in his favour to the amount of the money so paid. Upon that proof the defendant obtained a verdict in his favour, which was confirmed by the opinion of the Court of King's Bench, upon the ground that payment to a factor having a lien is a discharge. (*k*) ⸸ And on the same ground a purchaser will be warranted in paying to a factor so circumstanced, even

(18) ⸸ Ante, p. 111, n. 3. ⸸ (*i*) Ante, c. 2. *ad finem.*
(*k*) *Drinkwater* v. *Goodwin*, Cowp. 251.

after an act of bankruptcy committed by the principal; because, as was well observed by Mr. Justice Bayley, although the bankruptcy would undoubtedly operate as a countermand of his authority to receive the price *on account of his principal*, yet it does not operate to destroy his right to receive it *on his own account in respect of his lien*.(19)ǂ The debtor however, by paying the factor after notice, takes upon himself to make out the factor's right to receive it. (*l*)

3. If the principal allow the broker to deal with goods as if he were the principal, payment to him discharges the debt of the buyer. As where goods were consigned to a broker in *London*, from an out port, to be sold, who sold them to be paid for on delivery, he appearing in the business as a principal, and it being known to the owners that he usually dealt in that way, the buyer was held to be discharged by payment to him. (*m*) ǂ This subject underwent much consideration in the case of *Baring* v. *Corrie*, (20) from

(19) ǂ *Hudson* v. *Granger*, 5 B. & A. 27. ǂ [The factor however should give the buyer notice of his lien, and require him not to settle with the principal, since, otherwise, a payment to the principal would operate as a discharge to the buyer. *Coppin* v. *Walker*, 2 Marsh. 497. 7 Taunt. 237. S. C.]

(*l*) Cowp. 255, per Lord Mansfield.

(*m*) *Coates* v. *Lewes*, 1 Campb. N. P. C. 444.

(20) ǂ 2 B. & A. 137. It was a claim of set-off, and will be adverted to more particularly hereafter. It serves, however, to

which the following result may be obtained. Where brokers accustomed to act both in that capacity and as principals, make a contract of sale in such a manner as to make it probable that they are acting in the former character, payment to them under such circumstances would be made at the risk of the purchaser; because, if misled, it is the consequence of his own neglect in not making such inquiries as would have led to a correct knowledge of the facts. If the principal has conferred on the broker the indicia of property, then of course, having enabled him to mislead, he must abide the consequences; but if he has employed him merely as a broker to make the sale, he is not, and ought not to be a sufferer for a breach of that confidence which, by the necessities of trade, every merchant is compelled to place in his broker. ✝

Wherever payment to an agent would be sufficient, where he is authorized to receive it, a *tender* to him has the same effect as a tender to the principal in person. (*n*) (21)

illustrate the subject now under consideration. Indeed there is great difficulty in separating the subject of payment to, and set-off against a factor or broker; and in this instance, as in others, the method and division adopted by the author are productive of some inconvenience and confusion. ✝

(*n*) *Goodland* v. *Blewith*, 1 Campb. 477. (See also *Muffat* v. *Parsons*, 1 Marsh. 55; 5 Taunt. 307. S. C.)

(21) [But a tender *by* an agent does not discharge the principal without actual payment. Thus, where the maker of a promissory

SECTION 6.

Authority of Agent to discharge, compound, or release Debts.

1. An agent who has a general authority to receive payments, which is a matter of evidence, may, without collusion, receive them in what manner he chooses, so as to acquit the debtor, provided it be such as the course of trade warrants.(*a*) Thus, where an agent, who had the management of *Sir C. Thorold's* cash transactions, took a banker's check in payment of 100*l.* due to his master, and kept it a week, when the banker failed, this was deemed to discharge the debtor, by Lord Ch. J. Holt, who relied upon the circumstance of the agent having a general authority. Mr. J. Powell was of the same opinion; but not being satisfied as to the fact of the authority, which it was agreed was more matter of evidence than of law, a new trial was granted for the purpose of ascertaining that fact.(*b*) But an agent

note paid money into the hands of an agent to retire it, and the agent tendered the money to the holder of the note, on condition of having it delivered up, but the note being mislaid this condition was not complied with, and the agent afterwards became bankrupt with the money in his hands; it was holden that the maker still continued responsible on the note. *Dent* v. *Dunn*, 3 Campb. 296.]

(*a*) 11 Mod. 88.

(*b*) *Thorold* v. *Smith*, 11 Mod. 71, 88; and see 10 Mod. 109.

specially employed to receive payment in money, cannot vary from his authority by receiving a bill.(c) And even a general agent cannot, without particular authority, commute the payment by receiving another thing, as a horse, &c. in discharge of the debt; unless it be delivered over to the employer, who agrees to it.(d) Nor can an agent, without an express authority, compound a debt.(e) A scrivener on behalf of his client having agreed to a composition, it was held to bind the scrivener, but not the client.(f) But a broker, employed to subscribe a policy of insurance, has authority to adjust the loss.(g) (1)

2. A release upon a composition (h) under a

(c) Ib. and *Ward* v. *Evans*, 2 Ld. Raym. 930; 2 Salk. 442.

(d) Dr. & St. 286.

(e) An attorney on record may bind his principal by submission to award by rule of Nisi Prius; Say. 259; 1 B. Ab. 208; but it is said, that the assent of a solicitor to a reference by rule of a court of equity is not binding on the client without his actual concurrence. 1 Ch. R. 104; 1 Ch. Cas. 86. Qu. ‡ It was admitted in that case, that the consent would have been binding at law: for at law even [where an attorney had agreed to refer, contrary to the express desire of the client, the Court would not set aside the order of *Nisi Prius*, by which the cause was referred, but left the client to his remedy against the attorney. *Filmer* v. *Delber*, 3 Taunt. 486.] And see *Mole* v. *Smith*, 1 Jac. & W. 673, that the consent of counsel properly instructed is binding on the client. ‡

(f) 2 Vern. 127.

(g) 2 Esp. Cas. 269; 1 Camp. 43; cont. Beawes, 43.

(1) Ante, p. 191.

(h) Moor. 818.

power for that purpose, or a submission to award (*i*) by like authority, must be made in the name of the principal, and not of the agent; unless, perhaps, upon the assignment of a debt with power to the assignee to compound &c. where, by reason of his interest, it may be in his own name. (*j*)

3. Accounts settled between two agents without vouchers, but upon confidence, will not be considered as binding upon the principals, but liberty will be allowed in equity to surcharge and falsify. (*k*)

4. Where an agent has authority to receive payment, his receipt is the receipt of the principal. (*l*) But if he give a receipt without having in fact received the money, that is no bar to the principal. (*m*) For it would not be a bar, if given by the principal himself, upon proof of the actual nonpayment. (*n*)

(*i*) Salk. 70; 12 Mod. 129; 1 Ld. Raym. 246. Ante.

(*j*) *Bamfill* v. *Leigh*, 8 T. R. 571.

(*k*) *Beaumont* v. *Boultbee*, 7 Ves. Jun. 617.

(*l*) 11 Mod. 88.

(*m*) Dr. & St. 286, unless it be a release by an agent properly authorized to make releases, which must be by deed.

(*n*) 2 P. Wms. 295; Ambl. 269; *Fitch* v. *Sutton*, 5 East, 230.

SECTION 7.

Delivery to an Agent.

A delivery of goods or money to an agent or servant in the course of his employment, is for most purposes equivalent to a delivery to the employer. (*a*) As to charge him in an action of trover; (*b*) ‖ or assumpsit for goods sold and delivered. ‖ To charge a carrier with the receipt of goods to be conveyed, it is sufficient to show a delivery to his servant usually employed in that business. (*c*) So in an action for money had and received, it is sufficient to show that it came to the hands of an agent employed by the party charged with it. (*d*) And in an action brought to recover back the deposit paid on an intended sale, it was held unnecessary to prove any more than that it was paid to the person who appeared as agent for the defendant, the seller. (*e*)

And though, in an action against the agent, it be [is] a defence to him that he has paid over the money to his principal, (*f*) yet the reverse affords no defence to the principal, if the action be brought against him. (*g*)

(*a*) 10 Mod. 310; 2 Mod. 309.

(*b*) Str. 505. Post.

(*c*) Bull. Ni. Pr. 72; Ld. Raym. 792; Campb. 118.

(*d*) *Mathews* v. *Haydon*, 2 Esp. Cas. 509.

(*e*) 1 Camp. 339.

(*f*) Post.

(*g*) *Carey* v. *Webster*, 1 Str. 480.

PART III.

HOW FAR THE PRINCIPAL IS ANSWERABLE FOR NEGLIGENCE, OR WRONGFUL ACTS OF THE AGENT.

SECTION 1.

Neglect or Fraud of Agent.

1. By the employment of an agent, the employer becomes civilly responsible for his care and diligence to those who make use of him in his business. For, says Lord C. J. Holt, where a trust is put in one person, and another whose interest is entrusted to him is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified. (*a*)

In noticing the authorities to this purpose, reference will be had to some which may seem to belong rather to the law of master and servant than to the proper subject of this treatise; but as the principles now under discussion are derived from that source, these authorities cannot be deemed irrelevant.

(*a*) 12 Mod. 490.

A master is responsible for the negligence or unskilfulness of a servant acting in the prosecution of his service, though not under his immediate direction.(*b*) Thus a smith, whose servant injures a horse brought to him to be shod, or a surgeon, whose servant treats a patient with gross want of skill, is liable to answer for the injury.(*c*) Thus also an action lies against the master for damage occasioned by his servant exercising an unruly horse in an improper place,(*d*) or by negligence in keeping a fire used in the master's service.(*e*) ‡ And on the like principle, a landlord has been considered as *primâ facie* liable for the act of his bailiff in taking *privileged* goods under a distress for rent, though not himself present at, nor participating either at the time or afterwards in the transaction. But the same learned judge who so stated the law, added, that if when the landlord came to the knowledge of the circumstances he disclaimed and repudiated the act, his liability would cease.(1) ‡ Similar actions for negligence in driving carriages,(*f*) or navigating ships,(*g*) or negligently packing goods to be car-

(*b*) 1 Ld. Raym. 264.
(*c*) 4 Bac. Ab. 584.
(*d*) *Michael* v. *Allestree*, 2 Lev. 172.
(*e*) 1 Ld. Raym. 264; Salk. 13.
(1) ‡ *Hurry* v. *Rickman*, 2 Moody & M. 126. ‡
(*f*) 6 T. R. 661; 2 Salk. 441, pl. 2; 1 Campb. 167. Post.
(*g*) 8 T. R. 188.

ried by the master as a common carrier,(*h*) are in frequent use.

Upon this principle the owners of ships are responsible for the non-performance ⸸ or mis-performance ⸸ of their contracts by the masters whom they employ.(*i*) ⸸ And in like manner, the master is answerable for the conduct of the mariners under his command. ⸸

And though the injury be not occasioned by the person immediately employed, but by another whom he employs under him, or with whom he contracts for the performance of what he has undertaken; yet the responsibility of the first employer reaches through all the stages of the service, as the following case exemplifies.

A. employed B. to repair a house; B. contracted with C. to do the work, who engaged D. to furnish materials. D.'s servant, by negligently leaving the materials in the road, occasioned an injury to the plaintiff, who was held entitled to recover against A.(*k*) (2)

(*h*) 1 Wils. 282.

(*i*) 8 T. R. 533; 3 Mod. 320; and see Salk. 441; trover lies for goods lost by a servant. ⸸ The responsibility is limited by 53 Geo. III. c. 159, s. 1, to the value of the ship and freight. ⸸

(*k*) *Bush* v. *Steinman*, 1 Bos. & Pull. 409.

(2) [A landlord of a house demised by lease is liable for an injury occasioned by the negligence of the workmen employed to repair the house, where the repairs are done under his superintendence, although at the expense of the tenant. *Leslie* v. *Pounds*, 4 Taunt. 649.]

‡ On this principle the proprietor of a waggon was deemed liable for an injury occasioned by the negligence of the driver, although it appeared that the proprietor was partner with another in the business of carriers, and that it was the exclusive department of that other to provide the horses and drivers. "The action," said Ch. J. Gibbs, "is maintainable on this principle. The waggon belongs to *Elkins* [the defendant]: he has the profit of the carriage—on what terms he engages with other persons to horse the waggon we cannot tell. The servant is engaged to drive the waggon for *Elkins*, as well as for his immediate employer. Though by the subordinate contract between the parties he is the servant of one, yet in contemplation of the law, and for all purposes of legal responsibility, he is in the employ of both."(3) The civil law seems to have confined the liability resulting from the acts of servants to the case where the servant was chosen by the master and under his immediate control; but it is doubtful whether our law in some instances does not carry it further. Accordingly, the question whether the owner of a carriage having hired of a stable-keeper a pair of horses and a driver for the day, was responsible for an injury caused by the negligence of that driver,

(3) ‡ *Weyland* v. *Elkins*, Holt, N. P. C. 227; 1 Stark. N. P. C. 272, S. C. ‡

was the occasion of a memorable conflict of opinion among the judges of the Court of King's Bench. Abbott, C. J. and Littledale, J. held, that he was not liable. Bayley and Holroyd, Js. that he was.(4) In the several elaborate judgments delivered upon that case, every argument and every authority which can throw light upon the subject is to be found.

2. But the responsibility of the master for the servant's negligence, or unlawful acts, is limited to cases properly within the scope of his employment. For where the servant of a stage coachman (not being a common carrier of goods) undertook to carry goods, which he lost, it was determined that the master was not liable, for no master is chargeable for his servant but when he acts in execution of the authority given by his master.(*l*) And in an action brought against the owners of a ship for goods lost by the carelessness of the master, judgment was given for the defendant, because it did not appear that the ship was usually employed to carry goods for hire; for Lord Hardwicke said, "no man could say

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(4) *Laugher* v. *Pointer*, 5 B. & C. 547. Upon the original argument for a new trial in the King's Bench the judges differed in opinion, whereupon it was directed to be argued anew before all the judges; and there being still a difference of opinion, it was referred back to the judges of the King's Bench to deliver the judgment.

(*l*) *Middleton* v. *Fowler*, 1 Salk. 282.

that the master, by taking in goods of his own head, could make the owners liable."(*m*)

‡ Nor is the master liable for the *wilful* act of his servant, whereby damage is occasioned to another: for this is a *trespass* by the servant, for which the master cannot be made answerable unless he has originally commanded or subsequently assented to the act. Therefore, where a servant wilfully drove his master's carriage against another, without the direction or assent of his master, the latter was not held liable.(5) And in a similar case the distinction was thus stated: If a servant driving a carriage, in order to effect *some purpose of his own, wantonly* strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment.(6) ‡

This constructive negligence or misconduct,

(*m*) *Boucher* v. *Lawson*, Rep. Temp. Hardwicke, 85, 194; Abbot, 109. ‡ And see *Colvin* v *Newberry*, 8 B. & C. 166; Dan. & Lloyd, 61; afterwards reversed on error in Exchequer Chamber. *Newberry* v. *Colvin*, 7 Bing. 190. All the authorities as to the liability of the owners of a ship chartered to the master will be found there referred to. ‡

(5) ‡ *M'Manus* v. *Crickett*, 1 East, 106. ‡

(6) ‡ *Croft* v. *Alison*, 4 B. & A. 590. ‡

arising from the acts of an agent, has been held not to attach to some public offices,(n) such as the postmaster-general,(o) commissioners of the customs and excise, auditors of the exchequer, &c. who are not liable for any negligence or misconduct of the inferior officers in their several departments.(p) [And the captain of a king's ship of war is not responsible for the damage done to another vessel through the negligence of his lieutenant, although the captain be on board the ship, provided no personal misconduct on the occasion be imputable to him.(7)] But this only applies to inferior *officers* of the department; for if the person, whose misconduct comes in ques-

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(n) Per Holt, C. J. 2 Salk. 240; 4 T. R. 66.

(o) *Lane* v. *Cotton*, 1 Ld. Raym. 646; 1 Salk. 18; *Whitfield* v. *Lord Le Despencer*, Cowp. 754. This exception does not include sheriffs, who are liable for their under-sheriffs and bailiffs: as for a false return by the under-sheriff, Dr. & St. 280; for an erroneous return of a panel, whereby it is quashed, Roll. Abr. 92. pl. 2; or for an escape of a prisoner in execution from the bailiff, ib. pl. 3. So for money wrongfully taken by a bailiff, under colour of his office, the sheriff is liable in an action for money had and received, *Jones* v. *Perchard*, 2 Esp. Cas. 507. But the plaintiff must prove the authority by the warrant, and show that it was executed by the person to whom it is directed, but need not show that the money came to the sheriff's hands, ib. And in 3 Wils. 309, it was decided that trespass lay against a sheriff for taking the goods of A. instead of B. by his bailiff.

(p) Cowp. 766. This distinction in favour of public officers is of very old standing. See Dr. & St. 279; Di. 2, c. 42; and see Stat. de Scaccario, 51 H. 3, st. 5, s. 7 & 8; st. 21, Ed. 3, c. 21. De proditionibus.

(7) [*Nicholson* v. *Mounsey*, 15 East, 384.]

tion, be the private servant or deputy of the principal officer, the latter is liable for his acts. Thus, the Chancellor of (q) the Court of Augmentations to King Edward VI., having by virtue of his office, taken a bond from the purchaser of lead, sold by the King's order, and having deposited the bond with his servant, who fraudulently delivered it to the obligor, was held by all the judges to be chargeable to the King, because the possession of his servant by his order was his own possession.

⸸ The ground of the exemption is, that as the appointment is not with the principal, he ought not in reason to be answerable for the acts; and on this manifest ground of equity, owners and masters of vessels are, by the statute which regulates the pilotage of ships,(8) released from all liability to third parties for the negligence or unskilfulness of *pilots* duly licensed and qualified. ⸸

2. If a man employ an agent in the commission of a fraud, he is clearly liable for it himself; as if a goldsmith by his servant put off counterfeit plate,(r) or a taverner corrupted wine; they are

(q) Dy. 161; 3 Mod. 323.

(8) ⸸ 6 Geo. 4, c. 125. There are other clauses in the act taking away the responsibility of the master and owner in particular cases. ⸸

(r) Cro. Jac. 473; 1 Str. 653; Roll. Abr. 95. l. 15. It is adjudged in a very old case, that if a servant sell an unsound horse in a fair, the master is not liable, unless he commanded him to sell to some one in particular; but if, by command or cover of

answerable. And employers are also civilly liable for frauds committed by their servants or agents, without their authority, if done in their employment.(s)

The owner of counterfeit jewels, knowing them to be so, sent an agent abroad with them to be disposed of; but without directions either to represent them as genuine, or to sell them to any one in particular. The agent, however, representing them as good jewels, procured a person to sell them as such, who was imprisoned by the laws of the country for the deceit, for which injury he brought an action against the owner of the jewels, and recovered.(t)

In an action on the case for a deceit in selling silk to the plaintiff, as silk of a particular description, the defendant well knowing that it was of another description, it appeared that there was no actual deceit in the defendant, but that it was in his factor abroad; and the question was, if this deceit should charge the merchant. And Holt, C. J., was of opinion, that the merchant was answerable for the deceit of his factor, though not

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the master, he sells to one in particular, an action lies, 9 H. 6. 53; Bridgm. 128.

(s) 1 Str. 653 (S. P. per Lord Ellenborough in *Crockford* v. *Winter*, 1 Campb. 127.)

(t) *Southern* v. *How*, Bridgm. 126, 127; 2 Moll. 330. In the report of this case, Cro. Jac. 468, it is said that the court inclined against the plaintiff; but the judgment finally given is not there mentioned. Ante, p. 152.

criminaliter yet *civiliter; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and confides in the deceiver should be a loser than a stranger.*(u)

3. The principal is never criminally answerable for the act of his deputy; they must each answer for their own acts, and stand or fall by their own behaviour. To affect the superior criminally by the act of his deputy, there must be the command of the superior for the act in question.(w)

‡ An exception, however, to this general rule seems to have been introduced into the law in cases of libel. On a recent prosecution against the proprietors and editor of a newspaper for a libel,(9) evidence was given on the part of the proprietor, showing that at the time of the publication in question he was in a distant part of the country, not in any way interfering with the conduct of the paper in which the libel was contained; and it was contended on general principles that he could not be made criminally responsible for the act of his servant; but Lord Tenterden in summing up said, "I am bound to state the law as I have received it from my predecessors. It is conceded that it has been held in several cases

(u) *Hern* v. *Nichols*, 1 Salk. 289. But see 1 Com. Dig. 240.

(w) Per Raymond, C. J. 2 Str. 885; *Rex* v. *Stone*, 7 T. R. But the act of a deputy may forfeit the office of the principal, 29 H. 6. 34, cited 1 Salk. 18.

(9) ‡ *Rex* v. *Gutch*, 1 Moody & M. 433. ‡

that a proprietor so situated is criminally answerable. It is said, that this is a different principle from that which prevails in all other criminal cases, but this does not appear to me to be so: the rule seems to me to be conformable to principle and to common sense. Surely a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person (10) might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether."

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(10) Supposing the report to be correct, it is difficult to understand what his lordship meant by this expression. There can be no person who is not *criminally* responsible. Every man is capable of being punished. If his lordship meant *civilly* irresponsible, then the argument had no application, because no one pretends that the proprietor ought not to be answerable CIVILLY; that is to say, in damages to the party injured.

SECTION 2.

Tortious Conversion, or Trespass of Servant or Agent.

1. Any unlawful meddling with, or conversion of property by a servant or agent in the service of his employer, subjects the latter to an action.(*a*) As if a servant, employed in the management of business, purchase goods which have been stolen, the owner may recover the amount from the master, after a demand and refusal.(*b*) Thus also, where an agent of the East India Company purchased a ship, for the use of the Company, of the master, who had no power to sell it: on a bill filed against the Company a decree was made, that they should account for the ship and cargo, though the purchase were without their privity.(*c*) So a servant selling the goods of an intestate, and paying over the money to his master, makes the latter liable as executor de son tort.(*d*)

Upon an action of trover against a master, a pawnbroker, it was held sufficient for the plaintiff to prove that he tendered the money, for which the article was pawned, to the pawnbroker's servant, who said he had lost it.(*e*)

(*a*) Say, 41, 42; 1 Str. 505.
(*b*) 12 Mod. 521.
(*c*) 1 P. Wms. 396.
(*d*) 2 T. R. 97.
(*e*) Per Holt, C. J. 2 Salk. 441.

2. The previous command,(*f*) or subsequent assent,(*g*) of the master to the trespass of his servant, makes him liable as a trespasser. But he is not liable for trespasses committed by his servant beyond what his directions extend to,(*h*) nor is he answerable for any excess committed in the execution of his lawful commands.(*i*)

3. The responsibility of the principal is confined to acts done either under his express direction, or in his service, and therefore under his constructive command. In all the cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury.(*k*) No wilful trespass of a servant, not

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(*f*) 4 Inst. 317; Bro. Trespass, 118, 3??. A party whose attorney sues out a void writ, under which the defendant is imprisoned, is, together with the attorney, liable to an action, 2 Bl. Rep. 215, ib. 866, though the sheriff or officer executing the writ is protected by it. Id. ib. ‡ And the attorney is answerable for a trespass committed by his *agent* in suing out execution after payment by the judgment debtor, though it was done without his knowledge. The attorney and the agent are to be considered as one person. Per Abbott, C. J. *Bates* v. *Pilling*, 6 B. & C. 38. ‡

(*g*) Bro. Trespass, 113; 6 Com. Dig. 393.

(*h*) *Sanders and Archer's case*, 2 Leon. 75; Plow. 18 Eliz. 437.

(*i*) Skinn. 228; Bac. Ab. Master and Servant, (L). But see Lane, 90.

(*k*) 27 Ed. III. st. 2, c. 19, enacts, that nul marchaunt nautre, de quel condition quil soit, perde ne forface ses biens ne marchaundises pur trespass et forfaiture de son servant sil ne le face

arising out of the execution of his master's orders or employment, will make him responsible. (*l*)

4. Where several agents are employed, the remedy for injuries sustained by the act of one must be either against the first employer, or against the party by whom the injury is immediately occasioned. (*m*)

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per commaundment ne abette de son maistre, ou qu'il eit mespris en l'office en quel son maistre luy ad mys, ou en autre manere que le maistre soit tenus a respondre pur le fait son servant per le ley marchaunt, come per ailleurs ad est usee.

(*l*) 8 T. R. 533; 1 East, 106; 6 T. R. 125; Br. Ab. tit. Trespass, pl. 435. Ante, p. 299.

(*m*) 6 T. R. 411; 1 Bos. & Pull. 404.

PART IV.

ACTIONS AGAINST PRINCIPALS.

SECTION 1.

Pleadings in.

IN declaring upon a contract executed by an agent it may be described as a contract by the principal. Thus, in an action on a policy of insurance, not under seal, signed by a broker, it is sufficient to declare either as upon a policy signed by the defendant himself, or as upon a policy signed by his agent for him.(a) (1) It is said by Lord Mansfield to be the better way to declare according to the truth; that is, upon a

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(a) *Nickleson* v. *Croft*, 2 Burr. 1188, 9.

(1) [So a bill of exchange, though accepted by an agent, may be stated in pleading to have been accepted by the principal. *Heys* v. *Heseltine*, 2 Camp. 604. And even if the declaration state that the principal indorsed the bill, *his own proper hand being thereunto subscribed*, that averment, it seems, may be satisfied by proof of an indorsement by an authorized agent. *Helmsley* v. *Loader*, ib. 450. But see *Lary* v. *Wilson*, 5 Esp. N. P. C. 180, *contrà*.]

policy signed by J. S. as agent for the defendant, duly authorized by him in that behalf.(*b*) A declaration charging the *master*, the defendant, with having negligently driven his cart against the plaintiff's horse, was held to be supported by evidence that the servant drove the defendant's cart.(*c*) (2)

SECTION 2.

What Proof of Authority necessary.

1. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by a power of attorney, it must be proved by the production of the instrument itself, that it may appear whether the authority has been pursued.(*a*) And if the act be such as could only be done under a written

(*b*) *Nickleson* v. *Croft*, 2 Burr. 1188, 9.

(*c*) *Rucker* v. *Fromont*, 6 T. R. 659.

(2) ‡ But where the action is brought against the *master* it must be an action on the case, and not of trespass. ‡

(*a*) *Johnson* v. *Mason*, 1 Esp. Cas. 89; and in *Coore* v. *Callaway*, Ib. 115, Lord Kenyon said he recollected a case where a person having refused to take a conveyance, executed by one having a power of attorney for that purpose, it was held to be lawful in him to refuse a conveyance so executed, as it multiplied his proofs.

authority,(*b*) it seems requisite to produce it,(*c*) or to account for the non-production. But in other cases, it is sufficient to prove that the agent has acquired credit by acting in that capacity, and has been recognized by the principal in other instances. Thus in an action on a policy of insurance, underwritten by the defendant, it was proved that the defendant's name was subscribed by one H., who, it appeared, was in the constant habit of subscribing policies for the defendant. It was insisted that the authority of H. should be produced, because it might have been limited, or for a particular purpose: but Lord Kenyon held, that the acts of H. held him out to the world as properly authorized; and his having subscribed several policies in the defendant's name was sufficient evidence of that authority in order to charge the defendant; and that if H. were only a particular agent for the defendant, it lay upon

(*b*) Ante, Ch. III. p. I. s. 1.

(*c*) But see *Rex* v. *Bigg*, 3 P. Wms. 427, where it is alleged in argument, that, in an action against the bank upon one of their notes, it would not be necessary to prove the appointment under seal of the subscribing clerk, but that it would suffice to show his employment in fact. Ante, p. 156.

[And in the case of *Yarborough* v. *The Bank of England*, 16 East, 6, which was an action of trover, it was decided that if it were essential to a conversion of the property that the Bank should have authorized the act under their seal, such authority would be presumed after verdict; but that it did not seem necessary that the act of detention done by their servants, within the scope of their employment, should be so authorized.]

him to show it, and not on the plaintiff.(*d*) But it must be presumed, though not mentioned in the report, that there was some evidence of the agent's former transactions having been recognized by the principal. For in a late case, which was likewise upon a policy of insurance, the subscription was by one B. for the defendant: and a witness proved that he had often seen B. sign policies for the defendant, but had not seen any general power of attorney from the defendant to B. nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed. Lord Ellenborough held, that the agency was not sufficiently proved.(*e*)

2. In all actions founded upon the acts of agents, whether upon contracts or for injuries done by them, for which damages are sought against the principal, it is necessary to give such evidence as establishes the relation between master and servant.(*f*) When the general relation does not exist, it must be shown in the particular instance.(*g*) In all mercantile transactions, ex-

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(*d*) *Neale* v. *Erving*, 1 Esp. Cas. 61. ‡ *Haughton* v. *Ewbank*, 4 Campb. 88; ante, p. 169, &c. ‡

(*e*) *Courteen* v. *Touse*, 1 Campb. 43, n. (*a*). In actions on policies of insurance, signed by agents, they may either be described in the declaration as signed by the defendant himself, or by A. B. his then factor or servant in that behalf. *Nickleson* v. *Croft*, 2 Burr. 1188. Ante, p. 308.

(*f*) Per Lord Kenyon, 7 T. R. 113.

(*g*) Id. ib. The following distinction is mentioned by way of

cept where the authority is specially given by power of attorney, or other express commission in writing, the fact of usual employment, from which the public is justified in giving credit to the person so employed, forms the usual evidence of authority.(*h*) The circumstances under which that presumption may be made having been already treated of, it is unnecessary to repeat them here.(*i*)

Or where no previous authority can be proved, it is often sufficient to prove a subsequent assent by the person for whom an act is done; and his accepting the benefit of the act amounts, in many instances, to proof of such assent.(*k*) An authority to receive payment upon bonds, bills, &c. is usually evidenced by the custody of the instruments themselves.(*l*)

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illustration. In an action against a sheriff for the misconduct of his bailiff, who is not considered as the general servant of the sheriff, it is necessary to prove the sheriff's warrant under which the bailiff acted; but an under-sheriff is the general deputy of the sheriff for all purposes, and it does not therefore require the same evidence of particular employment to affect the sheriff by his acts. 7 T. R. 113.

(*h*) And see ante, note (*c*). *Rex* v. *Bigg*, 3 P. Wms. 427. It seems that usual employment is evidence of the regularity of the appointment.

(*i*) Ante, p. 161, &c. (*k*) Ante, p. 165, &c.

(*l*) Ante, p. 274, &c.

SECTION 3.

What Authority necessary by the Statute of Frauds.

By the 4th section of the statute 29 Car. II. c. 3, certain agreements therein mentioned are made void, unless the agreements, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, *or by some other person thereunto by him lawfully authorized.* And by section 17, relating to the sale of goods above 10*l.* some note or memorandum in writing of the bargain must be made and signed by the parties to be charged by such contract, or their *agents* thereunto lawfully authorized. It becomes therefore often necessary to decide what persons are empowered under these provisions to sign the agreements and contracts there mentioned. It has been already seen, that the authority under these clauses need not be in writing.(*a*) An opinion was in one case intimated, that sales by auction of goods were not within the 17th section: and it was decided in the same case, that if they were, yet that the auctioneer was to be considered as agent for both parties, so as to fulfil the requisites of the statute, by putting down the name of the buyer in his

(*a*) *Simon* v. *Motivos*, 3 Burr. 1921.

book.(*b*) The former opinion appears now to be considered as very questionable.(*c*) (1) The latter decision has been sometimes doubted; and a contrary determination has taken place in regard to sales of land; (*d*) though the provisions of the statute, as to the memorandum in writing, are the same in both.(*e*) (2) But whatever be the

(*b*) *Hinde* v. *Whitehouse*, 7 East, 572; *Blagden* v. *Bradbear*, 12 Ves. 472. But see 13 Ves. 472, 473.

(*c*) *Coles* v. *Trecothick*, 12 Ves. 249.

(1) ↓ And has since been altogether denied; first, incidentally by Lord Ellenborough in *Hinde* v. *Whitehouse*, 7 East, 568; and secondly, by a positive decision on the point in *Kenworthy* v. *Schofield*, 2 B. & C. 945. ↓

(*d*) *Stansfield* v. *Johnson*, 1 Esp. N. P. C. 101, coram Eyre, C. J. *Walker* v. *Constable*, 1 Bos. & Pull. 306.

(*e*) Per Lord Eldon, 9 Ves. 249. The only difference between the 4th section and the 17th, in this respect, is, that the expression used in the 4th section is "some other person thereunto lawfully authorized;" and in the 17th it is "their agents thereunto lawfully authorized."

(2) [In the case of *Emmerson* v. *Heelis*, 2 Taunt. 38, it was decided by the Court of Common Pleas, that an auctioneer was, by implication, an agent lawfully authorized by the purchaser to sign a contract for him for the purchase of an interest in land, and that the authority was communicated by the purchaser bidding aloud. This decision was acted upon and recognized in the subsequent case of *White* v. *Proctor*, 4 Taunt. 209: and it should seem that it makes no difference, whether the auctioneer writes down his own name, or that of the purchaser, or that of the bidder, if agent for another, since the auctioneer's signature of the bidder's name will bind the principal. This question was afterwards brought under the consideration of Sir William Grant in the case of *Kemeys* v. *Proctor*, 3 Ves. & Bea. 57, in which his honour adhered to the decisions in the Common Pleas, although he observed, that "if the question were open, and he were asked

foundation of this distinction, the rule formerly laid down as to sales of chattels has been uniformly adhered to,(*f*) and is become the rule in all sales made by brokers acting between the parties buying and selling; where the memorandum in the broker's book, and the *bought and sold notes* transcribed therefrom and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding upon each.(*g*) But

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his opinion whether an auctioneer be the agent of the purchaser as well as of the vendor, he should be disposed to say that he was not." Where, however, it is neither admitted nor proved that the signature was by an agent lawfully authorized, a court of equity will not compel a specific performance of the contract. *Howard* v. *Braithwaite*, 1 Ves. & Bea. 202.]

(*f*) *Hinde* v. *Whitehouse*, 7 East, 569, 572, per Lord Ellenborough.

(*g*) Id. ib. *Rucker* v. *Cammeyer*, 1 Esp. N. P. C. 105; *Hicks* v. *Hankin*, 4 Esp. N. P. C. 114. The names of both buyer and seller ought to appear in the memorandum. *Champion* v. *Plummer*, 1 Bos. & Pull. New Rep. 253; 5 Esp. 244. Though in *Hicks* v. *Hankin*, 4 Esp. N. P. C. 114, cited above, a note in this form, "Sold, G. H., 320 quarters of malt at 74*s*." signed "J. T." J. T. being the *seller*'s broker, was ruled by Mr. Justice Heath to be sufficient within the statute.

[The bought and sold note, which is a copy of the entry in the broker's book, is not sent to the parties for their approbation, but to inform them of the terms of the contract, the entry made and signed by the broker being alone the binding contract. *Heyman* v. *Neale*, 2 Camph. 337; *Gale* v. *Wills*, 1 C. & P. 388, S. P. In the case of *Dickenson* v. *Lilwal*, 1 Stark. N. P. C. 128, the question arose whether the bought and sold notes made by a broker were sufficient to satisfy the Statute of Frauds, although he made no entry of the contract in his book; but, although that

an auctioneer's clerk, notwithstanding any usage

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point was reserved by Lord Ellenborough, yet as the counsel for the plaintiff elected to be nonsuited on another point that arose in the trial, the previous question never came under the consideration of the Court. Where a broker, employed both by buyer and seller, negociates a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract arises. *Thornton* v. *Kempster*, 5 Taunt. 786. ‡ *Cumming* v. *Roebuck*, Holt, N. P. C. 172; *Grant* v. *Fletcher*, 5 B. & C. 436. In the last case the entry made by the broker was not signed, and there was a variance between the bought and sold notes delivered. The following is the judgment of Ch. J. Abbott. "The broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the *same* contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes signed by the broker and delivered to the parties, although the book be not signed; but if the notes are imperfect, as in the present case, an unsigned entry in the book will not supply the defect. It is the duty of brokers to make the contract so as to be binding on both parties. They are employed to prepare contracts on which great sums of money depend; and I must say, that in many cases which have come before me, they appear to conduct their business in a very slovenly, negligent manner." In *Goom* v. *Afflalo*, 6 B. & C. 117, it was decided according to the opinion so intimated, that the bought and sold notes duly signed were a sufficient memorandum of the bargain within the Statute of Frauds, though there was no corresponding entry in the broker's book. ‡ So if, at the instance of the seller, and without the consent of the purchaser, a material alteration be made in the sale note by the broker, such alteration annuls the instrument so as to preclude the seller from recovering upon the contract evidenced by the instrument so

of trade, is not an agent within the statute without a special authority or assent.(*h*)

A memorandum, signed by an agent, thus, "Witness A. B., agent for the seller," is sufficient.(*i*)

Section 4.

Evidence of Contracts made by Agents.

After the authority is established, the next thing necessary, in order to recover upon a contract made by an agent, is to establish the contract itself by proof. It follows, from what has been already shown, that as to every thing which forms a part of the contract the declarations of the agent, at the time of the contract, or upon which it is founded, are equivalent in effect to those of the principal, and of course may be proved by parol evidence, or by the handwriting of the agent.(*a*) But declarations which do not

altered. *Powell* v. *Divett*, 15 East, 29.] ┼ And see *Horsfall* v. *Fauntleroy*, Lloyd & Welsby, 340. Ante, p. 250. ┼

(*h*) 9 Ves. 251.

(*i*) *Coles* v. *Trecothick*, 9 Ves. 237. The memorandum there was, "Witness, E. Phillips, for Mr. Smith, agent for the seller;" but there was evidence of a particular assent by the seller to the agency of E. Phillips, which brings it to the same thing as stated in the text.

(*a*) Ante, p. 256, &c. 10 Ves. 123; 5 Esp. Cas. 72, ib. 135; and see also 2 Esp. Cas. 145; 5 Esp. Cas. 145.

make any ingredient in the foundation of the contract are not evidence of the facts to which they refer; though those facts may be connected with the transaction. This was exemplified by a case where, in an action for the non-delivery of goods, the question was which party should supply the bags; and a letter of the agent, not cotemporary with the contract, but admitting that his principal was to supply them, was rejected.(*b*)

If the contract arise upon the payment of money, or the delivery of goods, it is sufficient to show that the money was paid, or the goods delivered to the agent of the party to be charged. (*c*)

SECTION 5.

Evidence of the Agent against his Principal.

The vendor of goods to a factor for the use of his principal may make the factor a witness. (*a*)

So in an action for money had and received, to charge a person with the receipt of money, the servant who received it is a good witness without a release. (*b*) It is, says Lord Kenyon, the constant course of *nisi prius*, arising *ex necessitate*, to

(*b*) Ante, p. 272. *Maesters* v. *Abraham*, 1 Esp. Cas. 375.

(*c*) Ante, p. 293. *Mathews* v. *Haydon*, 2 Esp. Cas. 509; *Jons* v. *Perchard*, ib. 507.

(*a*) Per Lord Hardwicke. It has been often so settled at Guildhall. *Snee* v. *Prescott*, 2 Atk. 248.

(*b*) *Mathews* v. *Haydon*, 2 Esp. Cas. 509.

admit the evidence of clerks and porters, who are alone privy to the receipt of money or the delivery of goods. (c)

Where the question is, whether a person to whom money has been paid for the use of another, was an agent duly authorized to receive it, so as to charge the principal in an action ↓brought by him ↓ for the money: it has been held that the authority may be proved by the agent himself. In an action of assumpsit it appeared that the sum of money in dispute had been paid to B., who had been the agent of the plaintiff, and, as the defendant alleged, continued to be so at the time when he received the money. The plaintiff admitted the receipt by B., but denied the agency; to prove which, B. himself was proposed as a witness, and rejected: but when the question was discussed on a motion for a new trial, which was applied for on the ground of B. being improperly rejected, the Court were of opinion the objection to B.'s admissibility was not well founded, because in any event the witness stood indifferent in point of interest between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant; and that if such an objection were to prevail, it might exclude brokers who had effected policies of in-

(c) Ib. and see post. Officers, secretaries, &c. of public companies are compelled to answer in equity. 3 P. Wms. 312. 1 Bro. Ch. R. 469.

surance; and that it would be difficult hereafter to draw any certain line; and the rule for a new trial was granted. (*d*)

(*d*) *Ilderton* v. *Atkinson*, 7 T. R. 480, *Quære*, whether an agent would be permitted to prove that he had acted within his authority in making a contract, since he would be liable personally to the plaintiff if he had exceeded it; and the reason of necessity does not apply.

[In the case of *Gevers* v. *Mainwaring*, 1 Holt, N. P. C. 139, this question arose; and it was ruled by Gibbs, C. J. that the agent was not a competent witness without a release. In the case of *Ilderton* v. *Atkinson*, it was objected that B. had a stronger interest to give evidence in favour of the defendant than of the plaintiff, since if he had received the money under a misrepresentation of his own character, the defendant might recover from him the costs of the action then depending, as well as the money: but the Court held that the possibility of such a remote interest did not render him incompetent. And upon the authority of this case it was held in that of *Birt* v. *Kershaw*, 2 East, 458, that a liability to pay, in the event of one party failing, the costs of the action in addition to the money recovered, for which he would have been liable either to the one or the other, did not affect the competency of the witness. The authority of these cases has, however, been considerably shaken in more modern times. In the case of *Jones* v. *Brooke*, 4 Taunt. 464, which was an action against the acceptor of a bill accepted for the accommodation of the drawer, the Court of Common Pleas held that the drawer was not a competent witness for the defendant to prove that the holder received the bill on a usurious consideration, on the ground that he was bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation, and would therefore be liable to the acceptor not only for the principal sum but also for all the costs with which he might be charged in the action. So in the case of *Townend* v. *Downing*, 14 East, 567, in which that of *Ilderton* v. *Atkinson* was cited, as having decided that a liability to pay costs did not affect the competency of a witness where he was liable

Thus also, in an action against the owners of a ship for money borrowed by the captain, the latter was held by Lord Kenyon to be a good witness for the plaintiff to prove that the money was borrowed for the use of the ship, and not for his own use. It was objected, that he came to discharge himself by throwing the onus upon the owners: but it was answered, that the owners had a remedy over against him, if the money came to his hands, and that he was therefore indifferent. (e)

But in an action on a policy of insurance for a loss by barratry, the captain is not a competent

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to an action in either event of the cause, Lord Ellenborough asked " Why there should not be an interest in costs, as well as on any other account." See also *Harman* v. *Lasbrey*, 1 Holt's N. P. C. 390. S. P.] ⊥ And upon the principle so laid down it is suggested by Mr. Phillips, in his Treatise on Evidence, 7th edition, p. 62, that the case of *Ilderton* v. *Atkinson* must be considered as overruled, and that a witness in such a situation would not stand indifferent between the parties. In *Edmonds* v. *Lowe*, 8 B. & C. 407, the Court decided, on the same ground, that the acceptor of a bill of exchange was not a competent witness for the drawer in an action by an indorsee, to prove that he (the acceptor) had received the bill from the drawer for the purpose merely of procuring it to be discounted for the use of the drawer, and that he had delivered it for that purpose to the plaintiff, who had immediately appropriated it to his own use in discharge of a debt owing from the acceptor to him. But the rule does not extend to an indorser, for he could never recover from the acceptor the costs of defending an action brought upon the bill. *Dawson* v. *Morgan*, 9 B. & C. 618. ⊥

(e) *Evans* v. *Williams*, Guildhall Sittings after Tr. T. 28 Geo. II. B. R. 7 T. R. 481.

witness to prove that the barratry was with the consent of the owners, without a release from the underwriters; because he is liable to them if the plaintiff recover.(*f*)

No agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except counsel and attornies.(*g*)

(*f*) *Bird* v. *Thompson*, 1 Esp. Cas. 339. Lord Kenyon gave this as the reason for rejecting the evidence of the captain; and said, that though he knew of no action of that sort ever having been brought, yet he conceived that wherever a man acted contrary to his duty, whereby another received damage, or was rendered responsible or liable to damage, he might maintain an action ex delicto against the person who had so subjected him. ‡ See also *Corking* v. *Jarrard*, 1 Camph. 37; *Clarke* v. *Shee*, Cowp. 199; *Green* v. *New River Company*, 4 T. R. 589; *Bird* v. *Thompson*, 1 Esp. N. P. C. 339; *Miller* v. *Falconer*, 1 Camph. 251; *Cuthbert* v. *Gostling*, 3 Camph 515.‡

(*g*) 4 T. R. 431.

CHAPTER IV.

RIGHTS OF PRINCIPALS FROM THE ACTS OF THEIR AGENTS.

SECTION 1.

1. As an employer is bound by the contracts and acts of his representative, so he may take advantage of them. It is said in an old authority, "the master shall have advantage of his servant's contracts, in the same manner as he shall be bound by them, as to those matters which come within his compass as a servant; as where a servant was sent by a master to a debtor, and appointed by him *ad componendum et agreandum* the money due from the debtor; and there being a promise made to the servant to pay what was due upon the balance and agreement, it was held, that the master might maintain an action in his own name on the promise to his servant as upon a promise to himself."(a)

But this is only under such circumstances as afford room to presume an authority; for where the evidence was that the defendant had agreed

(a) *Seignior* v. *Walmer*, Godb. 360.

with the plaintiff's servant to pay him half price, which the servant was to have to his own use, this, it was held, would not maintain the action, for there arose no contract to the plaintiff.(*b*)

It is a maxim which is daily acted upon, that if a factor sell goods for his principal, the action may be brought either in his own name, or in that of the principal. And in the latter case the principal has the benefit of the factor's evidence.(*c*)

And though the agent act by a *del credere* commission, which makes him liable at all events to his employer,(1) yet the responsibility of the buyer to the employer is not altered by that circumstance.(*d*)

Contracts made for the benefit of another, but without his privity or direction, may be rejected or affirmed at his election.(2) But by making the election to affirm it he adopts the agency altogether, as well that which is detrimental, as that which is for his benefit.(*e*)

(*b*) Per Holt, C. J. *Thorp* v. *How*, Bull. N. P. 130.

(*c*) 1 Atk. 248.

(1) ↓ See ante, p. 111, n. (3.) ↓

(*d*) *Grove* v. *Dubois*, 1 T. R. 113; 4 B. Ab. 602, Merchant (B). Ante, 111, (3).

(2) [In the case of *Routh* v. *Thompson*, 13 East, 274, where a person made an insurance for the benefit of A. without his knowledge, it was held that A. might subsequently ratify it, and the insurance would enure to his benefit, upon the principle that *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*. See also *Hagedorn* v. *Oliverson*, 2 Maule & Selw. 485, S. P.]

(*e*) Ante, 145. *Wilson* v. *Poulter*, 2 Str. 859. ↓ It is on

2. But in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent, which would have had that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent affects the principal's right to recover.(*f*)

3. Moreover, if an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him as if he were in fact the principal. So that, under these circumstances, he may set off against the demand of the principal a debt due from the factor to himself.(3)

this principle that actions of tort are converted, as they frequently are, into actions of contract. The party injured (as by an unlawful conversion and sale of his property) may waive all complaint of the wrong done him by the conversion, and may adopt the sale as made for his benefit; but if he do so, his damages will be limited by the proceeds of the sale, however short of the actual value of the property. And see ante, p. 172, et seq. ‡

(*f*) Ante, 194, 199, 203, 224. ‡ *Earl of Ardglasse* v. *Muschamp*, 1 Vern. 239. ‡

(3) [On the same principle it has been decided, where an auctioneer sold the goods of B. as the goods of A., and the buyer (without notice from the auctioneer not to pay A.) took the goods with the auctioneer's assent, and paid the price of them to A., that the auctioneer could not afterwards maintain an action for the price. *Coppin* v. *Walker*, 2 Marsh. 497; 7 Taunt. 237, S. C.]

It has been seen (4) that a purchaser is discharged by payment to a factor, unless where notice has been given by the principal not to pay him: and that the payment, even after such notice, is warranted in the following cases. 1st, Where the factor acts under a *del credere* commission, in which the principal gives credit to him, and he to the buyer. (5) 2d, Where the factor has a lien upon the price of his balance, which entitles him to receive the payment. These seem to be the only cases in which a purchaser, dealing with a factor, *and being aware of his representative capacity,* can safely *pay* the price to him after notice from the principal; but if a buyer deal with a factor or broker wholly in his own name, and without knowledge of any other person being a party to the contract, he is entitled, in the absence of collusion, to regard the debt as due to the factor or broker, so as in an action brought by the principal to set off a debt due from the factor to himself, or to defend himself by a payment to him. (g) This question is distinct in principle from that just adverted to, of *payment* to a factor having a lien upon the price. There the indemnity is founded upon the title of the latter to receive the money; and therefore it is indifferent whether or not the buyer knew at

(4) | *Ante*, p. 278. |

(5) Not so, see ante, p. 111, n. (3).

(g) *Post.*

the time of contracting that he was dealing with an agent; (6) whereas the right now spoken of is the right of the debtor, and is built upon this principle, that where the buyer has been led to contract under an impression that his contract is with one person, he cannot afterwards be defrauded of the rights which he has against that person by the introduction of a third to whom he was a stranger; and therefore this right can only exist in those cases where the purchaser deals with the agent as a principal. (*h*)

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(6) *Hudson* v. *Granger*, 5 B. & A. 27, ante, p. 287, 288.

(*h*) This principle is collected from the case of *Stracey and Others* v. *Decy*, London Sittings after Mich. 1769, 7 T. R. 361, which, though not a case of principal and agent, does not seem the less applicable to the present purpose. *Assumpsit* for goods sold; pleas, *non assumpsit* and set-off. The plaintiffs jointly carried on trade as grocers: but *Ross* was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, *Ross* was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker; and being indebted for grocery (as he confessed) to *Ross*, he effected insurances and paid premiums on account of *Ross* solely, to the amount of his debt; under the idea that one demand might be set off against the other. Payment of the money due from the defendant was demanded by the firm; and was refused by him on the ground of his having been deceived by the other partner's keeping back and holding out *Ross* as the only person concerned in the trade. Lord Kenyon, C. J. was of opinion, that as the defendant had a good defence by way of set-off as against *Ross*, and had been, by the conduct of the plaintiffs, led to believe that *Ross* was the only person contracted with, they could not now pull off the mask and claim payment of debts

In an action for goods sold to the defendant by the owner's factor, the defendant set off a debt

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supposed to be due to *Ross* alone, without allowing the party the same advantages and equities in his defence that he would have had in actions brought by *Ross*.* Verdict for defendant. ‡ The same principle is acted upon in actions *against* partners. Thus to an action against two partners upon a bill of exchange, drawn upon and accepted by *Saunders, Brothers, & Co. London*, the defendants pleaded in abatement that there were other partners who ought to have been joined. On the issue raised by this plea, Lord Tenterden left it to the jury to say whether the plaintiffs had reason to suppose that the two defendants constituted the firm in question at the time when the contract was made, and the answer being in the affirmative, a verdict was taken for the plaintiffs. The case was subsequently brought before the Court, and it was there decided that the direction was right—that the question was, with whom was the contract made -that where the transaction was with a firm in which there were secret partners, the existence of whom became known to the party dealing after the contract and before payment, *he had his choice* to sue either those only with whom he contracted, or the whole firm —and that the case of *Dubois* v. *Ludert*, 5 Taunt. 609, in which the contrary had been held, was not good law. *De Mautort* v. *Saunders*, 1 B. & C. 398. In the case of Ex-parte *Norfolk*, 19 Ves. 455, Lord Eldon stated that such had been the practice in bankruptcy for the last thirty years - "It has," said he, "been taken as unquestionable that if I deal with A. he cannot, with reference to that transaction, say there is a contract between him and B., of whom I know nothing; thus compelling one to be a joint creditor of those two, whose joint property may be scarcely anything, and not the sole creditor of the only man I knew. I have said in this place, following a series of precedents, that the joint creditors may elect: that a man *purchasing from, or selling to A., not knowing of any partner*, may consider A. as the sole vendor or vendee. He may, finding that B. has taken a share of the profits, elect to go against him also, but he cannot be compelled certainly." ‡

due to him from the factor upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by the factors and not by the plaintiff. Lord Mansfield delivered his opinion as follows: Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal. And though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled.(*i*) On a later occasion this opinion was made the ground of a judgment by which the law is established upon this head. This was in the case of *George* against *Clagett*. The plaintiff, a clothier, employed certain persons as his factors under a *del credere* commission, who, besides acting as factors, bought and sold great quantities of woollen cloths on their own account; and all their business was carried on at one warehouse. The defendants being at that time the holders of a bill accepted by the factors, which they had received in the course of trade, bought

(*i*) 7 T. R. 360, (*a*). *Rabone*, jun. v. *Williams*, Middlesex Sittings after Mich. 1785. In *Bayley* v. *Morley*, London Sittings after Mich. 1788, Lord Kenyon recognized the law of this case, id. ib.

cloths of the factors at twelve months' credit, which were taken out of one general mass in the factor's warehouse. The bills of parcels of the whole were made out in the factors' names, and the buyers did not know that any part of the goods belonged to the plaintiff. The factors having failed, the defendants received notice from the plaintiff that part of the goods bought were his property; and the question was whether the defendants were entitled to set off their demand against the factors on the bill of exchange, on the ground that the defendant dealt with them as principals; and upon the authority of the case just referred to it was determined that they were. (*k*)

But circumstances which show collusion between the factor and buyer, as the insolvency of the factor known to the buyer, would defeat the right he would otherwise have. (*l*) This right depends upon the ignorance of the contracting party as to the real character of the person with whom he deals; and therefore has been held not to enable a person, effecting a policy of insurance by the direction of one whom he knew to be an agent, to withhold the money recovered upon the policy, on account of a debt due to him from the

(*k*) 7 T. R. 359. The fact of the factor having a *del credere* commission does not appear to have weighed in the judgment, though mentioned in the case.

(*l*) *Escot* v. *Milward*, 7 T. R. 361, (*b*).

agent; and it was thought a sufficient intimation of the agent's character that he, in a time of war, being an English subject, described the ship as *neutral.* (m) And although the buyer, at the time of making the contract of sale with a factor, be not apprized of his representative character; yet if at any time before the contract be completed by the delivery of all the goods, and even after the delivery of part, he come to the knowledge of the principal, he cannot avail himself of a set-off against the factor. But he might in this case be discharged by paying the factor, if not prevented by notice from the principal. (n) The mere general knowledge, however, of the seller being a factor is not sufficient to deprive the buyer of the privilege of set-off without express knowledge that he acts as agent in that particular instance, because a man who is in the habit of selling for others may likewise sell goods of his own. (o)

┼ The case of *Baring* v. *Corrie*, which has been already alluded to, (8) strikingly illustrates the principle and limits of the doctrine now under consideration. The question was, whether the purchaser had a right to set off against the claim of the vendor, a debt of the broker, by whom the sale had been effected.

(m) *Maans* v. *Henderson*, 1 East, 335.

(n) *Moore* v. *Clementson*, 2 Campb. N. P. C. 24.

(o) Ibid.

(8) ┼ Ante, p. 288. ┼

And it was said by Bayley, J., that upon this three questions arose: "1st, Did the plaintiffs (the vendors) enable Coles & Co. to appear as proprietors of the goods and to practise a fraud upon the defendants (the purchasers)? 2dly, Did Coles & Co. actually practise a fraud? and 3dly, Did the defendants use due care and diligence to avoid such fraud?"—in other words, were the purchasers misled into a belief that they were dealing with Coles & Co. as principals, and if they were misled, was it by the fault of the principals in enabling the brokers so to mislead them, or by their own fault in not instituting proper enquiries—all which questions being answered against the defendants, the plaintiffs had judgment.(9)

It will be seen, on reference to the report of that case, that much stress was laid on the difference of character of broker and factor. "The distinction," says Abbott, C. J., "between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are conveyed for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal: the latter therefore, with full knowledge of those cir-

(9) ‡ 2 B. & A. 137. The facts being somewhat long and special, and the case itself important, it has been thought advisable to retain in this edition the report given in the appendix to the 1st edition; see Appendix, II. ‡

cumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation, he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not; and at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker: for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether." ‡

To these the following case may be added, as falling under the same principle. The defendant was a person whose business it was to receive money for cattle sold in Smithfield from the purchaser. To an action brought by the owner of cattle sold for the money so received by the defendant, the latter claimed to set off a debt due from the salesman to himself. Evidence was offered to prove that by the universal custom of the market the defendant was considered as the

debtor of the salesman, and not of the owner, with whom he had no connection. But Lord Kenyon refused the evidence, declaring no custom could deprive the plaintiff of that which by the law of the land he was entitled to receive; and laid particular stress upon the defendant's knowledge, that he received the money for the use of another; which he said distinguished the case from that of a banker receiving money from a factor whose principal he had never heard of. (*p*) ⊥ And so it is in the case of an underwriter—he cannot, as we have seen, set off a debt from the broker against the loss due to the assured, however usage may have sanctioned such a course of dealing.(10) ⊥

It is clear that a principal can never be allowed to set off a debt due to him from his own broker, against the demand of one with whom he has contracted through the medium of the broker. (*q*)

It should be observed, that where the principal resides abroad, he is presumed to be ignorant of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties. (*r*)

4. Upon the same principle that a party contracting with a factor as principal is entitled to the same right of set-off in an action by the prin-

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(*p*) Peak's Ni. Pr. Cas. 177.

(10) ⊥ Ante, p. 281 *et seq.* ⊥

(*q*) *Waring* v. *Favenc*, 1 Campb. 85.

(*r*) *Paterson* v. *Gandasequi*, 3 Bos. & Pul. 489; 15 East, 64.

cipal that he would have had in an action by the agent, he may also discharge himself in such action by any payment to the agent, which would have operated as such to the principal. (s)

SECTION 2.

The right of a principal to recover money or goods paid, or wrongfully transferred by an agent, is next to be considered.

Money paid by an agent may be recovered back by the principal under any of the following circumstances, 1st, Where the consideration fails. If an agent make a deposit on a treaty for a purchase conducted by him in his own name, and without disclosing his principal, the latter may nevertheless, upon the failure of the seller to fulfil the bargain, recover it in his own name. (a) And when an underwriter had subscribed a policy effected by an insurance-broker for his principal, and in the policy "confessed himself paid the premium," he was not allowed, in an action by the principal for a return of premium, to allege that no money had been paid by the broker to him. For, by the usage of that business, running accounts are kept between the underwriter and the brokers, and no money paid at the time by

(s) *Coates* v. *Lewes*, 1 Campb. Ni. Pr. Cas. 444.

(a) *Duke of Norfolk* v. *Worsley*, 1 Campb. N. P. C. 337.

the latter. And it was said by Lord Ellenborough, that if a man acknowledge that he has received a sum of money from the broker, and accredit him with the principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. (*b*)

2dly, Where money is paid by an agent through mistake. Thus, where the amount of a bill specially indorsed by the payee was paid by the drawer's agent to a subsequent indorsee, and it afterwards turned out that the payee's indorsement was a forgery, the drawer recovered the money back in his own name (*c*) from the person to whom the agent had paid it.

3dly, If money be illegally extorted from an agent in the course of his employment, the principal may sue for it. A case of this nature occurred in the instance of an overcharge made upon a master of a ship, at the Custom House, for fees (the payment of which is imposed personally upon the master): an action was brought

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(*b*) *Dalzell* v. *Mair*, 1 Campb. N. P. C. 532. And see *Power* v. *Butcher*, 10 B. & C. 329; Lloyd and Welsby, 115.

(*c*) *Ancher* v. *The Bank of England*, Doug. 637, 4 and see the cases of *Treuttel* v. *Barandon*, 8 Taunt. 100; *Sigourney* v. *Lloyd*, Dan. & Lloyd, 132, supra, p. 237, from which it appears that where a bill specially indorsed to an agent has been discounted or otherwise paid away by him, the principal may recover the bill in an action of trover, or the money received for it in action of assumpsit for money had and received to his use. 4

by the owners for the over-payment, in which they were nonsuited, upon the ground that the action would only lie by the master who paid the money. But the nonsuit was set aside; and the Court declared there was no doubt, that where a man pays money by his agent which ought not to have been paid, either the agent or the principal may recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent.(*d*)

4thly, Where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose, it may be recovered back by the principal from the fraudulent holder, if it can be clearly traced, and by that means shown to be his, as in the following case. The plaintiff's clerk, who was employed by him to receive money, applied various sums, as well as several negotiable notes so received, in the insurance of lottery tickets prohibited by stat. 12 Geo. III. c. 46. In an action for money had and received, the money was actually traced from the customers to the defendant through the clerk, and the plaintiff recovered.(*e*) Upon the first

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(*d*) *Stevenson* v. *Mortimer*, Cowp. 805. If a servant be cozened of his master's money, the master may have an action on the case against the cozenor, Roll. Abr. 98. Cro. Jac. 223. So an action lies by a master against the hundred, if his servant be robbed of his money, Cro. Car. 37.

(*e*) *Clark* v. *Shee*, Cowp. 197.

impression Lord Mansfield was of opinion against the plaintiff, thinking that the master could not stand in a better situation than the servant, and that the servant was clearly *particeps criminis.* (*f*) But, though he retained his opinion as to the servant's inability to recover, he changed it as to the master's right; for he says, the plaintiff does not sue as standing in the place of his clerk; he sues for his identified property, which has come to the hands of the defendant iniquitously and illegally. (1)

Where money or notes are paid *bonâ fide*, and upon a valuable consideration, they never can be brought back by the true owner. But where they come *malâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. (*g*) In the case just mentioned, the payment of the money not being in the course of the clerk's employment, it was

(*f*) Perhaps upon the authority of the case of *Jaques* v. *Golightly*, 2 Bl. 1073, it would now be held that the clerk might recover; ┼ which was decided on the ground that although the insurance was rendered void by the statute, there was no illegality on the part of the insurer; ┼ but the circumstance of Lord Mansfield's having entertained this opinion makes this judgment an authority for the principal's right to recover even in those cases where the servant, by reason of his being in *pari delicto*, could not.

(1) ┼ See *Taylor* v. *Plumer*, 3 M. & S. 562; ante, p. 87. (4) ┼

(*g*) Per Lord Mansfield, Cowp. 200.

necessary to identify it, in order to prove that the master had any right to it.

The servant in this case is an admissible witness for the master, if released. (*h*)

⊥ It is almost unnecessary to add, that if the agent improperly dispose of a bill belonging to his principal, by indorsing it when over-due, the holder, who in that case takes it subject to all imperfections of title, cannot retain against the principal either the bill itself or one substituted for it, whilst in the hands of the same holder. (2)

And it has been already shown that not only must the notes, &c. have been received *bonâ fide* and for value, but that the party taking them must have exercised reasonable caution. So that if he took them without due enquiry, under circumstances which ought to have excited suspicion, he will be liable to make them good to the owner. (3) ⊥

5thly, Whether a master may bring an action for the recovery of his servant's earnings seems to be a point not altogether settled. (*i*)

⊥ There would not however, it is apprehended, be much difficulty in deciding such a point when

(*h*) Per Lord Mansfield, Salk. 289; Bull. N. P. 290. Qu. if a release be necessary, Salk. 289.

(2) ⊥ *Lee* v. *Zagury*, 1 Moore, 556. ⊥

(3) ⊥ Ante, p. 238. ⊥

(*i*) Upon this subject the reader is referred to Mr. Hargrave's note, Co. Litt. 117, a.

it arose. The question would be, 1st, Was the transfer of service originally made with the master's assent. If not, it seems clear that the master might, by subsequently adopting the act, maintain an action for work and labour done by his servant. If yes, there is then the futher question, whether the servant, in that particular employment, was to be considered as the servant of his original master or that of the person immediately employing him; and it is submitted that if the master were liable for wages to the servant, during the period of the substituted employment, the inference would arise that he still considered the servant as his own, and did not intend to waive the benefit of his earnings. But if by previous agreement he were released from a proportionate amount of wages, then the contrary conclusion would be the more reasonable. If payment have been made to the servant in ignorance that he was the servant of another, probably in that case the employer would be discharged.

SECTION 3.

Recovery of Goods wrongfully transferred by Agent.

When property is entrusted to an agent for any purpose, as for sale, &c. a transfer by him, agreeable to that purpose, and according to the usual course of trade, or his express commission, con-

veys a complete title to the holder. But a delivery for a different purpose, or in a manner not authorized by the commission, passes no property in the thing delivered, which may therefore be reclaimed by the owner.

A sale therefore upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer; and the thing sold may be recovered in an action of trover. (*a*)

Likewise a deposit by way of pledge or exchange (*b*) from a factor or broker, whose only authority is to sell, confers no right; therefore, notwithstanding an assignment of a bill of lading by a factor *as a pledge*, the vendor principal may stop the goods in transitu. (*c*) Or if the goods themselves have been deposited, the value may be recovered in an action of trover. (*d*) And this applies as well to securities not negotiable as to goods. (*e*)

In this action the holder of the goods cannot avail himself of any right which the agent, as between himself and his principal, might have to retain them. For this right is personal; and therefore it is not necessary, in order to support

(*a*) Ante, p. 212. (*b*) 3 Atk. 44, ante, p. 213.
(*c*) Ante, p. 215. *Newsom* v. *Thornton*, 6 East, 17; 4 Burr. 2046.
(*d*) Ante, p. 214. (*e*) Ante, p. 233.

the action, that the owner should tender to the holder the amount of what was due to the agent. (*f*)

And to assist the remedy afforded by this mode of proceeding, the holder may be compelled in a Court of Equity to give a description of the goods. (*g*)

As the taking of another's property, by the delivery of one who has no authority to deliver it, is in itself tortious, no demand and refusal is requisite to sustain the action of trover where the property has been pledged, (*h*) or disposed of in any other unauthorized manner, (*i*) as by an unwarranted sale, or by exchange. ↓ But if the original disposition of the goods to a third person was within the scope of the factor's authority, a subsequent dealing, whereby the transaction is converted into a pledge, will not make the holder liable in trover without proof of a demand and refusal, the *taking* having been lawful and the *detention* only being unjustifiable. (1) ↓

(*f*) Ante, 7 East, 4; 5 T. R. 604; 2 East, 523; but see an exception to this rule, ante, 217; ↓! and see p. 230. ↓

(*g*) 3 Ves. 226.

(*h*) *M'Combie* v. *Davies*, 6 East, 538.

(*i*) *Anon.* 12 Mod. 514.

(1) ↓ *Stiernhold* v. *Holden*, 4 B. & C. 5; and see *Dufresne* v. *Hutchinson*, 3 Taunt. 117.

SECTION 4.

What Acts of the Agent enure to the Benefit of Principal.

1. The acts of agents, properly authorized, enure to the benefit of the praty in whose name they are done. They are in truth his acts. Therefore on an issue, the form of which was whether a certain sum had been paid by the grantee of an annuity, evidence that it was paid by his agent was held to support the affirmative. (*a*) So the demand of a debt by a known clerk of a creditor is sufficient to make an act of bankruptcy by denial. (*b*) And a *demand* by a known agent, or one who produces his authority, and is empowered to receive the thing demanded, is sufficient to maintain an action of trover. (*c*)

2. But where a demand or notice, conveyed by an agent, is intended to affect a third person with damages for non-compliance therewith, it is necessary that the agent should be duly authorized. Thus on a plea of tender, and replication of a

(*a*) *Coare* v. *Giblett*, 4 East, 85. This point, it is necessary to observe, arose upon an issue joined upon the fact of payment, without reference to the annuity act, 17 G. III. c. 26. For it is not sufficient, under the requisitions of that act, sect. 3, to state in the memorial a payment of the consideration by the grantee, if it were in fact paid by his agent, 4 East, 101. *Aiken* v. *Mackreth*, 1 Bos. & Pull. N. R. 214.

(*b*) Co. B. L. 79. (*c*) *Bohtlingk* v. *Inglis*, 3 East, 381.

subsequent demand and refusal, the evidence of the demand was, that the clerk to the attorney in the cause had gone by his master's direction to demand the money, which the defendant refused, asking him by what authority he came, to which the clerk answered that he was sent by his master. Lord Kenyon said, that on an issue of this sort turning on the demand, (*d*) it should appear that the person who made the demand was properly authorized to receive the money; and though payment to the attorney would have been good, it was otherwise to a clerk who showed no authority but his master's orders to demand it. That the defendant therefore was not bound to pay the money to a person coming under these circumstances; and his representing himself as clerk to the attorney, and that he had been sent by him for the purpose of demanding it, was not a sufficient authority to receive, and therefore warranted the defendant in refusing to pay the money. And upon an issue as to the same fact, Lord Ellenborough ruled, that a demand by the attorney's clerk was not sufficient to rebut the effect of a previous tender, holding that the demand ought to have been made by some one authorized to give a discharge But a demand by the attorney himself would have done. (*e*) Nei-

(*d*) *Coore* v. *Callaway*, 1 Esp. Cas. 115.

(*e*) *Coles* v. *Bell*, 1 Camp. 478.

ther will a demand of goods by an unauthorized person support an action of trover. (*f*)

3. There are indeed some cases in which an act done without any previous authority may become beneficial to the person for whose use it was done, by his subsequent adoption of it. But this only holds where no immediate act is to be done upon it by a third person. Such are the instances of continual claim made, or an entry to avoid a fine by a person having no present authority; in which cases bringing an action upon these acts is considered such an adoption as supplies the want of authority. (*g*) But if the act done be intended to raise a duty in a third person, so as to subject him to damages for the non-performance of that duty, an unauthorized proceeding cannot be brought to have that effect by a subsequent sanction: for in that case the party is entitled to such a notice as he can act upon with certainty at the time it is given, and is not bound to submit himself to the hazard whether the principal will choose to ratify the act or not. (*h*)

Where upon the insolvency of a vendee, a person without any authority from the vendor, stop-

(*f*) *Solomons* v. *Dawes*, 1 Esp. Cas. 83.

(*g*) *Fitchett* v. *Adams*, Co. Lit. 258, a.; Str. 1108.

(*h*) *Right* v. *Cuthell*, 5 East, 198. Per Lord Ellenborough. And see the reasoning of Mr. Justice Lawrence in that case. (But see *Doe* v. *Chaplin*, 3 Taunt. 120.) ⊥ See ante, p. 190, n. (*c*), where the law on this subject is stated. ⊥

ped the goods in transitu, it was doubted whether his subsequent approval made the stoppage in transitu good.(*i*) ‡ And it is certain that unless the act was done adversely to the interests of the vendee, the subsequent adoption of it by the vendor cannot turn it into a stoppage in transitu. Thus in *Bartram* v. *Farebrother*, where the attorney of an insolvent vendee had, upon his suggestion and without instructions from the vendor, given notice to the warfinger not to deliver goods; it was held that the subsequent ratification of the act by the vendor did not make it a valid stoppage; although as the Court considered it a rescinding of an existing contract by consent of both parties, the ultimate decision was not affected by that circumstance. (2)‡

Even where the demand is made by a person properly authorized, yet it seems that the party has a right to be satisfied of the authority before he acts upon the demand; and that a refusal upon that specific ground is justifiable. Thus in an action of trover, where the demand was made by the plaintiff's wife, it is said by Lord Kenyon, "If the demand be not made by the plaintiff himself who is the owner, but by another person on his account, and the defendant refused to deliver the goods, *on the ground that he*

(*i*) 6 E[ast], 371, 380.

(2) ‡ [illegible] Bingh. 579; D[an]son and Lloyd, 42; and see *Siffkin* v. *Wray*, 6 East, 371.

does not know to whom they belong, and therefore keeps them till that is ascertained; or that the person who applies is not properly empowered to receive them; or until he be satisfied by what authority he applies, that shall not be deemed such a refusal as shall be evidence of a conversion. (*k*)

ǂ This doctrine however must be received with some qualification, for supposing the person making the demand to be properly authorized and known to be so, a refusal to deliver, on the ground that the holder is ignorant of the title of the party on whose account the demand is made, will not protect him against an action of trover. The refusal is at his own peril, if the title be subsequently shown. (3) ǂ

And where a proper authority exists, and is notified to the person on whom the demand is made, as where a demand of a debt is made under a power of attorney, it is not necessary that it should be produced, unless required to be so. (*l*)

SECTION 5.

Effect of delivery to Agent to vest the Property in Principal.

The delivery of goods to an agent so far vests the property in the principal as to conclude the

(*k*) *Solomons* v. *Dawes*, 1 Esp. Cas. 83.

(3) ǂ *Wilson* v. *Anderton*, 1 B. & Ad. 450. ǂ

(*l*) *Roe* v. *Davies*, 7 East, 364.

vendor's right to stop them in transitu. It is not necessary, in order to determine the *transitus*, that the goods should come to the *corporal* touch of the vendee. (*a*) But in applying the rule here mentioned, it is necessary to discriminate precisely between those agents who are merely employed in assisting the *passage*, from those by whose possession the *passage* is at an end, and the goods require a fresh direction to put them in motion. (*b*)

As long as the goods are in the hands of any person for the mere purpose of facilitating the conveyance to some further appointed place of destination, the vendor's right remains. (*c*) In the case of *Stokes* and *La Riviere*, the facts were these: The plaintiffs, by order of Messrs *Duhems* of *Lisle*, packed up goods, and delivered them to the defendants in *London*, to be forwarded to *Lisle*. These goods were forwarded by the defendants to their correspondents, Messrs. *B.* and *O.* at *Ostend*, with directions to send them to the order of Messrs. *Duhems*, On the receipt of the goods *B.* and *O.* wrote to *Duhems* an acknowledgment, and that they waited their directions. The plaintiffs, however, hearing of *Duhems'* insol-

(*a*) *Ellis* v. *Hunt*, 3 T. R. 464.

(*b*) Post.

(*c*) The distinction here alluded to may be illustrated by the doctrine delivered in the case of *Fowler* v. *M'Taggart*, 7 T. R. 442. Post, 354. n. (*q*).

vency, countermanded the goods while in the hands of *B.* and *O.*; and the action was brought against the defendants, who had got possession of, and retained them in right of *Duhems*, contending, that upon the delivery of the goods to themselves, as the agents of *Duhems*, the plaintiff's right to stop them was determined. (*d*) This cause was tried at *Guildhall*, before Lord Mansfield, who said, "The fact I take to be this: The *Duhems* bought goods of the plaintiff, which were ordered to be delivered to the defendants to be shipped to *Duhems*, who are since become insolvent, after the goods were sent to a factor at *Ostend*. No point is more clear than that if goods be sold and the price not paid, the seller may stop them *in transitu; I mean every sort of passage to the hands of the buyers.* There have been a hundred cases of this sort. *These goods are in the hands of the defendants to be conveyed;* the owner, therefore, may get them back again." (*e*)

Again, where goods had been sent by orders from the vendee to a packer, the packer was considered as a middle-man between the vendor and vendee; and, therefore, the Court held that they might be stopped *in transitu.* (*f*) This case is very shortly reported; but it must be presumed

(*d*) 3 East, 397, and 3 T. R. 466.

(*e*) 3 East, 398; 5 East, 185. ‡ The same point was determined in the case of *Coates* v. *Railton*, 6 B. & C. 422.

(*f*) *Hunt* v. *Ward*, 3 East, 467.

that the packer's business was preparatory to the goods being conveyed to the vendee.(g)

Thus also, *G.*, a trader at *N.* in *Devonshire*, ordered goods in *London*, which were sent, consigned to *G.* *viâ Exeter*, and advice thereof given to *G.* Upon their arrival at *Exeter*, which was as far as they could go by water, they were delivered to *C.* a wharfinger, who received them on *A.'s* account, and paid the freight and charges. It was held that, while in *C.'s* hands, the goods were still in *transitu*.(h)

A delivery to a carrier specially appointed by the vendee, who again delivers the goods to a wharfinger usually employed by the vendee on his account, to be forwarded to the vendee, does not prevent the right of the vendor to stop them. (i)

2. In all these cases the principle constantly referred to is that the goods were in some stage of conveyance to the purchaser, or his appointee. The following authorities will afford a clear line of distinction between the above and those cases in which the delivery of goods to an agent bars the right of the vendor to retake them.

In an action of trover it appeared that the goods

(g) This supposition is necessary to make the case accord with that of *Scott* v. *Pettit*, 3 Bos. & Pull. 469.

(h) *Mills* v. *Ball*, 2 Bos. & Pull. 457. (See also *Smith* v. *Goss*, 1 Camp. 282.)

(i) *Hodgson* v. *Loy*, 7 T. R. 440, post; ‡ and see *Bohtlingk* v. *Inglis*, 3 East, 380. ‡

in question were purchased of the plaintiff at *Manchester* by one *M.* (who was the general agent in *London* of the house of *Le Grand & Co.* of *Paris*) in the name of that house. By *M.*'s directions the goods were sent for him to the house of the defendant in *London*, who was a packer. Upon their arrival there, *M.* came to the defendant's house, and had some of the goods unpacked and sent away, and the remainder repacked. The house in *Paris* failing, the plaintiffs demanded the goods, which had been repacked, of the defendant, and tendered him his charges. *M.* had a general power either to send the goods to *Le Grand & Co.* at *Paris*, or to *Holland*, *Germany*, or such other market as he should think most beneficial. It was insisted for the plaintiffs, upon the authority of some of the cases cited above,(*k*) that the goods were still *in transitu*. But Lord Alvanley, with the concurrence of the court, said, "These goods were not sent to the defendant to be delivered by him to the house of *Le Grand & Co.* at *Paris*; but they were sent to *M.*, the agent of that house in *London*, and were there to await his disposal, he being invested with authority to send them to such market as he should think most advisable. None of the cases cited, therefore, apply to the present."(*l*)

(*k*) *Hunt* v. *Ward*, 3 T. R. 467.

(*l*) *Leeds* v. *Wright*, 3 Bos. & Pull. 320.

This case has a near resemblance to that of *Stokes* against *La Rivière*,(m) in which the result was the reverse: and it will be remarked, that the difference of the two cases consists in this, that in the present the effect of the first destination given to the goods by the sellers was at an end by the delivery to the buyer's agent in *London;* and it was not intended necessarily that they should ever come otherwise into the possession of the buyer than by being in that of the agent; but in the other, the goods were intended to be delivered to the buyers at *Lisle,* and the delivery to their agent in *London* was only in furtherance of that intention.

It has been observed that the delivery to a packer, preparatory to the conveyance to the buyer, has been held not to determine the *transitus;* but where the purchaser lived in *London,* and the goods were directed to him at an inn in *London,* where they arrived, and were taken from thence to his packer, he having no warehouse in *London,* it was determined that they could not be stopped by the vendor in the packer's hands.(n) For the *transitus* of goods is only not at an end by their reaching the packer, where they remain

(m) Ante, 348; 3 East, 397, 8.

(n) *Scott* v. *Pettit,* 3 Bos. & Pull. 469; and *semb.* goods consigned to a vendee in *London* are, upon their arrival and landing at the usual wharf there, no longer *in transitu.* *Richardson* v. *Goss,* 3 Bos. & Pull. 119.

with him for the purpose of being forwarded to some ulterior appointed place of destination.(o)

The following case adopts and confirms the principle of the foregoing. This was also an action of trover; and the goods in question had been furnished by the defendant resident at *Manchester*, to the order of *B.*, a trader in *London*; whose usual course of dealing it was to send orders to the defendant for goods to be forwarded to *M.* & *Co.* at *Hull*, for the purpose of being shipped to the correspondents of *B.*, at *Hamburgh*, and by those correspondents sent to the persons for whom the goods were intended. When the goods arrived at *Hull*, *M.* & *Co.* received orders from Messrs. *B.*, when and to whom to ship the goods at *Hamburgh*. The order for the goods in question was in the ordinary way, viz. to be packed in bales marked *G. S.* for order, and *to be forwarded to Messrs. M., to be shipped for Hamburgh, as usual.* They were accordingly sent to Messrs. *M.* at *Hull*, marked and made up as directed, where they were stopped by the defendants, the vendors. One of the house of *M.*, the agents at *Hull*, described their business to be merely *expeditors*, agreeable to the directions of Messrs. *B.*—a stage and mere instrument between buyer and seller; that

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(o) Per Lord Ellenborough, 3 East, 186.

they had no authority to sell the goods, and frequently shipped them without seeing them; that the bales were to remain at their warehouse for the orders of Messrs. *B.*, and they had no other authority than to forward them. The question upon these facts was, whether the vendors could stop the goods in the hands of the agents at *Hull;* and the court was of opinion that they could not; (*p*) assigning as a reason that the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination; and that without such orders they would continue stationary. (*q*)

⊥ And the same principles were recognized in

(*p*) *Dixon* v. *Baldwen*, 5 East, 175. *Diss.* Mr. Justice Grose.

(*q*) Per Lord Ellenborough, 5 East, 186. The doctrine by which the foregoing cases are governed may be further illustrated by the decisions in the cases of *Fowler* v. *M'Taggart*, 7 T. R. 442; 1 East, 522; 3 East, 396; and of *Bohtlink* v. *Inglis*, 3 East, 381. From which it may be collected, that if goods be put on board a ship hired by the vendee, not for the purpose of being carried from the vendors to the vendee, (per Lawrence, J. 3. East, 396,) but to be sent under the vendee's direction upon a mercantile adventure to some other place, the transitus is at an end; but that it is not so by delivery on board a ship sent by the vendee to bring away the goods from the place where they are brought, to the vendee; notwithstanding the ship is chartered by him, and the goods shipped at his risk. (See also *Ogle* v. *Atkinson*, 1 Marsh. 323.)

the more recent case of *Rowe* v. *Pickford*.(1) [That was an action of trover; and it appeared that the consignee was in the habit of purchasing *Manchester* goods, through the medium of an agent at that place, and of exporting them to the *Continent*, on or shortly after their arrival in *London*; that he had no warehouse of his own in *London*, and that the goods consigned to him remained in a certain waggon office, until they were removed by the consignee's agent, for the purpose of being shipped; that the consignee always received notice from the proprietors of the waggon office of the arrival at their warehouse in *London* of any goods addressed to him; and that such goods remained there until an opportunity for shipping them occurred, when an order to remove them, together with the note left with him containing information of their arrival, was given by the consignee to his shipping agents. On these facts the question that arose was, whether the consignor's right of stoppage *in transitu* was determined. And the court, observing that the question must be governed by decided cases, held, that as the consignee had no warehouse in *London*, but that the goods always remained at the waggon-office, until they were removed by the consignee's agent for the purpose of being shipped, the *transitus* must be considered

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(1) [1 Moore, 526.]

as at an end, and consequently that the right of stoppage *in transitu* was destroyed. (2)]

There is, indeed, one case which seems inconsistent with the distinction preserved in those already referred to, viz. that of *Hunter* v. *Beale*, which was an action of trover for a bale of cloth, sent by S. & Co. of Wakefield, to the defendant, an inn-keeper, directed to the vendee, to whom the defendant's book-keeper gave notice that a bale was arrived for them. The vendee thereupon gave orders to the defendant to send the bale down to the Galley Quay, in order to ship it on board the Union, to be carried to Boston. The defendant sent the bale to the quay; but, arriving too late to be shipped, it was sent back to him. A few days afterwards, the vendee's clerk went to the defendant's warehouse, when the defendant inquired what he was to do with the bale, and was ordered to keep it in his custody till another ship sailed, which would be in a few days. Before that happened, the vendee becoming insolvent, it was stopped by the vendors. This action was brought by the assignees of the vendee; and it was the opinion of Lord Mansfield, that though the goods might be legally delivered to the vendee for many purposes, yet for this purpose there must

(2) ⊣ See also *Foster* v. *Frampton*, 6 B. & C. 107; and on the subject of stoppage *in transitu* in general, see Law Mag. Vol. 5, Art. 7. ⊣

be an actual possession by the bankrupt, or (as his Lordship expresses it) they must have come to his corporal touch.(r) But it is to be observed of this case, that the position contained in the latter part of it, as to the necessity of actual possession, has been repeatedly contradicted, particularly by the authority of the case in the course of which it was cited. And further, that on a recent occasion, where this question was much discussed, the present Lord Chief Justice of the King's Bench (3) expressed the following opinion of the case: "In *Hunter* v. *Beale*, I cannot but consider the transit as having been completely at an end in the direct course of the goods to the vendee, *i. e.* when they had arrived at the inn-keeper's, and were afterwards under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him to Boston, being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination." And the same observation is made upon it by Mr. J. Le Blanc.(s)

(r) Cited in argument in *Ellis* v. *Hunt*, 3 T. R. 464. The case is no where reported.

(3) † Lord Ellenborough. †

(s) *Dixon* v. *Baldwen*, 5 East, 181.

SECTION 6.

Where the Agent is a Witness for the Principal.

1. In actions brought to enforce contracts made by means of an agent, it is clear that the agent himself is a good witness for his employer. This has been frequently ruled.(*a*) And in an action for not receiving goods contracted for, the only witness for the plaintiff was the factor who made the contract, and who was to have 1*s*. per pound on all that he sold. A verdict was given for the plaintiff, reserving the question of the witness's competency for the opinion of the Court of Common Pleas; and that Court unanimously determined that the factor was a good witness, considering him as concerned both for the vendor and vendee, and capable of being a witness for either.* And a case in B. R. of *Scholey* v. *Gambier*, Easter, 7 Geo. I., wherein it was held that a Blackwall Hall factor may be a witness, notwithstanding his commission, was mentioned by the Chief Justice.(*b*) A broker employed to sell goods, who is to have for himself whatever money he can procure beyond a stated sum, is nevertheless a competent witness to prove the contract

(*a*) *Mason* v. *Hogsden*, 11 Mod. 226, per Holt, C. J.; 1 Atk. 248, per Lord Hardwicke.

(*b*) *Dixon* v. *Cooper*, Wils. 40.

between the seller and buyer.(c) This exception to the general rule, which excludes witnesses on account of interest, arises from necessity; the nature of the transactions in which agents are engaged being such, that the contracts they make for others could not be proved without them. And it is not confined to factors or brokers, strictly so called, but every man who makes a contract for another, comes in some sort within the description.(d)(1)

2. It is, from the like principle of necessity,(e) the constant practice to admit servants and agents to prove the payment of money or delivery of goods on behalf of their principals, although it be in their own discharge. If money have been overpaid, therefore, by a servant, he is a competent witness in an action to recover it back.(f) Money embezzled by a servant from his employer, and paid by him in illegal lottery-insurances, was

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(c) *Benjamin* v. *Porteus*, 2 H. Bl. 591.

(d) Id. ib. per Eyre, C. J. Auctioneers are competent witnesses to prove the sale, *Buckmaster* v. *Harrop*, 4 Ves. 474.

(1) [Where a person has entered into a contract for the purchase of goods in his own name, he is not a competent witness in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant. *M'Brain* v. *Fortune*, 3 Campb. 317.] ✝ The question in the cause being whether he was *agent* or not. ✝

(e) *Theobald* v. *Tregott*, 11 Mod. 262, per Holt, C. J.

(f) *Martin* v. *Horrell*, Str. 647; see also *Barker* v. *Macrae*, 3 Campb. 144, S. P.

recovered from the office-keeper upon the evidence of the servant, who in that case had a *release*.(*g*) But in an action to recover goods against one who had received them by the tortious delivery of the servant, the latter was admitted to prove the fact, though it is not stated that he had a release.(*h*) And a servant who had embezzled money was admitted by Lord C. J. Holt in an action of trover to recover it from the person to whom it had been wrongfully transferred, though it does not appear that any release was given.(*i*) (2)

(*g*) *Clark* v. *Shee*, Cowp. 198.

(*h*) Bull. N. P. 290.

(*i*) *Anon.* 1 Salk. 289, and Bull. N. P. 290. "In trover against a pawnbroker, the servant embezzling his master's goods will be admitted to prove the fact."

(2) ↓ There seems to be some reason for doubting whether, under such circumstances, a servant would be a competent witness without a release. The rule of *necessity* does not apply, because that refers to the contracts of servants and agents made in the regular course of their employ. Here the acts done were not in the performance of their duty as servants. In *Corking* v. *Jarrard*, 1 Campb. 37, Lord Ellenborough refused to receive the testimony of a servant so situated without a release, and the release, though given, not being producible in Court, the plaintiff was nonsuited. ↓

CHAPTER V.

THE RIGHTS OF AGENTS AGAINST THIRD PERSONS.

SECTION 1.

THE rights which belong to agents are referable either to their representative, or individual character, according as the object is the advantage of the principal, or their own indemnity.

With respect to the *first*, it is clearly admitted, that where a contract is made by a factor, an action may be brought upon it in his own name.(*a*) And it is the same thing whether the contract be made by the factor solely upon his own credit, as is generally the case with factors abroad, or as the known representative of another; (*b*) and it is indifferent whether he act under a *del credere* commission or not.(*c*) For it is a right which is incident to his employment.(1) And it is equally

(*a*) 1 Atk. 248; Bull. N. P. 130.

(*b*) Bull. N. P. 130.

(*c*) 3 Bos. & Pull. 491, 495.

(1) [Before the intervention of the principal the debt is considered as being legally due to the factor, and consequently he is a good petitioning creditor under a commission of bankruptcy issued against the purchaser; but he ceases to be so when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt *directly* from the purchaser. *Sadler* v. *Leigh*, 4 Campb. 195.]

true of every other agent who has a special property in, and not the bare custody of that which is the subject of the contract. (*d*) Thus an auctioneer may maintain an action in his own name for goods sold and delivered, though the sale be on the premises of the owner of the goods, and known to be his property. (*e*) ⊥ But if he suffer the purchaser to pay the principal without giving him notice of his own claim, he cannot afterwards sue for the price. (2) ⊥

It is usual for actions upon *policies of insurance* to be brought in the name of the agent or broker instead of that of the principal. This is founded upon the promise being made to the agent, and does not depend upon his having a *del credere* commission. (*f*) ⊥ And where a policy under seal is effected by an agent, the action can only be brought in the name of the agent. ⊥

If money have been mispaid by an agent under circumstances which give a right to recover it back, the agent may bring the action in his own name, as well as the principal. (*g*)

(*d*) 2 Esp. N. P. C. 493.

(*e*) *Williams* v. *Millington*, 1 H. Bl. 81.

(2) ⊥ *Coppin* v. *Walker*, 7 Taunt. 237. ⊥

(*f*) If a contract be stated in the declaration to be with the agent, and it appear by the sale-note to be with him for his principal, the variance is not material. 2 Esp. Cas. 493; Bull. N. P. 130.

(*g*) Per Lord Mansfield, Cowp. 805. ⊥ It should seem, however, that where a person has made a contract professedly as

The possession which a factor, or other agent, has of his principal's property entitles him to bring actions of trespass or trover,(h) for injuries affecting the possession.(3) And it has been said, that a factor to whom goods have been consigned, and who has never received them, may maintain trover.(i) A doubt has been expressed,

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agent for another, but in reality for himself, he cannot, upon the rescinding of that contract, sue in his own name for money paid under it without giving previous notice to the party to be charged that he was the person really interested. *Bickerton* v. *Burrell*, 5 M. & S. 363.⊥

(h) 1 H. Bl. 81.

(3) [The right of the agent, however, to recover, must necessarily depend upon the title of the principal to the property in dispute; and, therefore, if such a degree of fraud can be brought home to the latter as to affect his title, the agent is equally affected by it. Thus, where a bank-note for 500*l.* had been fraudulently obtained by some person unknown, and on its being presented for payment some time afterwards by an agent of a foreign principal, information was given of the fraud, and the principal was desired to inform the bank how he came by it, but the only account he would give of it was, that he had received it in payment of goods from a man dressed in a particular way, of whom he knew nothing; and it was further proved, that bank notes of so large a value were not usually circulated in that foreign country; this was held to be sufficient evidence to be left to a jury, of the principal's privity to the original fraud, in an action of trover, brought by his agent to recover it from the bank, who had detained it under the authority of the original owner, to whom it properly belonged. And the question was not altered by the agent, who received it on account, having, after notice, made payments for his principal, which turned the balance in favour of the agent. *Solomons* v. *The Bank of England*, 13 East, 135, n.] ⊥ And see ante, p. 238.⊥

(i) 1 Bos. & Pull. 47, ⊥ per Eyre, C. J., *obiter*. ⊥

whether a mere agent, to whom a bill of lading is indorsed, without consideration, by the consignor, to enable him to receive the goods, can maintain trover before the receipt of them.(*k*) But it seems at present to be settled that he may, provided the consignment be not countermanded.(*l*) (4)

SECTION 2.

What Remedies an Agent has for his own Indemnity.

A factor may also have a right to enforce the payment of money to himself, in opposition to the claim of the principal. When a factor has a lien upon goods entrusted to him for sale, and which he has sold pursuant to that trust, the lien attaches upon the price, and the factor has a right to receive it for his own indemnity. This doctrine is laid down by Lord Mansfield, in a case

(*k*) See *Coxe* v. *Harden*, 1 East, 211.

(*l*) Per Lord Ellenborough, Sitt. after Tr. T. 1810, Guildhall.

(4) [But see *Waring* v. *Cox*, 1 Campb. 369, *semb. contra.*] ‡ The question seems to be, whether the agent, as consignee, has a personal interest in the goods, because to maintain trover, there must be a right of property of some kind, as well as a right of possession. ‡ [In the case of *Joseph* v. *Knox*, 3 Campb. 320, it was held, that a person who ships goods in an English port, as the agent of the owner resident abroad, and pays the freight for them, may maintain an action in his own name, for not delivering them according to the bill of lading.]

in which the right of the debtor to be discharged by paying the factor was discussed; and it is there declared, that in an action brought by the factor, to compel the payment of the price of goods sold by him, it would be no defence for the buyer, that as between him and the principal, he, the buyer, ought to have the money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him.(*a*) And in an action brought by a broker, for the price of timber sold for his principal, upon which the broker had a lien for sums advanced, Eyre, C. J., would not allow the defendant to set off a debt due to him from the principal.(*b*) This right equally exists where the factor has a lien upon the goods, though he be not answerable to his principal for the debt.(*c*) And is not affected by the circumstance of his being known at the time of the contract to be an agent.(*d*)

It seems therefore to follow, that if the debtor, after notice and tender of an indemnity by the factor, should nevertheless pay the principal, that he would be answerable to the factor in an action. But he does not seem bound to refrain from pay-

(*a*) *Drinkwater* v. *Goodwin*, Cowp. 256.

(*b*) *Atkyn* v. *Amber*, 2 Esp. Cas. 493.

(*c*) Cowp. 256.

(*d*) Ib. and 2 Esp. Cas. 493. In the latter case, the sale-note expressed that the sale was by the plaintiff, as agent of H.

ing the principal without an indemnity from the agent.(*e*)

The right which is founded upon the factor's lien for his advances, does not depend upon his being answerable to the principal for the debt. But upon this latter ground also, independent of the former, an agent acting upon a *del credere* commission, has a lien upon the price of the goods sold by him. Therefore, as between the buyer and an agent of this description, the latter is considered as the sole owner of the goods.(*f*)

It has been determined that an agent's parting with the lien which he has upon goods in his possession, is a good consideration for a promise, by a third person, to pay him the amount of his lien. And that such an undertaking need not be in writing, as being for the debt of another. Castling, a policy broker, who had a lien upon certain policies for his acceptances, gave up those policies to Aubert, to whom the principal had transferred his business upon Aubert's verbal undertaking to lodge money for the payment of Castling's acceptances. An action was held to be sustainable upon this undertaking: and the transaction being considered as a purchase of Castling's interest in the policies, was held to

(*e*) Cowp. 255.

(*f*) Per Chambre, J., 3 Bos. & Pull. 489. ‡ The misapprehension of the author upon this subject has been noticed and corrected, *ante*, p. 111, (3), and p. 280. ‡

have no relation to the Statute of Frauds, which avoids parol promises to pay the *debt*, or answer for the *default* or *miscarriage* of *another*.(g)

(g) *Castling* v. *Aubert*, 2 East, 325. ‡ A detriment sustained by the party to whom the promise is made, at the instance of the other, is as good a consideration as a direct benefit to the party promising. ‡

CHAPTER VI.

OF THE PERSONAL LIABILITY OF AGENTS.

SECTION 1.

1. IT now remains to be considered in what cases the agent is personally liable to those who deal with him.

In general, where a man is known to act merely as an agent, where the principal is known, and there is no express engagement by the agent, nor circumstances from which it may be inferred, that the credit is given to him, the rule is, that the agent, though the person immediately making the contract, is not subject to personal responsibility. It is laid down by very old authority, that if a servant, by express words do not bind himself, if the thing came to the use of his master, he is not liable at all (*a*). No rule of law, it has been said, is better ascertained, or stands upon a stronger foundation, than this, that where an agent names his principal, the principal is responsible and not

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(*a*) *Goodbaylie's case*, *Dy.* 230 *a*.

the agent.(*b*) And factors or brokers, therefore, acting for their principals, under a proper authority, are not, in general, liable in their individual capacities.(*c*) The question, indeed, is simply to whom the credit is given, whether to the principal alone, or to the agent alone, or to both jointly; as appears by the following case. This was an action for work done. The order was proved to have been given by *Gooch*, the defendant. The defence was, that the work was ordered for another person, named *Tippel;* that the work in question was done at *Tippel*'s house, and that the plaintiff, at the time of the order, was informed that the work was on *Tippel*'s account. The entry also in the plaintiff's books was, "*Tippel*, by the order of *Gooch*." Lord Kenyon: "The mere act of ordering the goods for another does not make the person giving the order liable. If a man order goods, though they be in fact for another, yet if the tradesman were not informed at the time that they were so, he who ordered them is certainly liable; for the tradesman must be presumed to have looked to his credit only. So if they were ordered for another person, and the tradesman refuse to deliver them to that person's credit, but to his only who ordered them, there is then no pretext for charging such third person:

(*b*) Per Lord Erskine, *Ex parte Hartop*, 12 Ves. 352.
(*c*) Per Lord Ch. Talbot, 3 P. Wms. 279.

or, if the goods were ordered to be delivered on account of another, and after the delivery, the person who gave the order refuses to inform the tradesman who the principal is, that he may sue him; under such circumstances he is himself liable. But wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable. In this case the plaintiff was informed of all the circumstances; *Gooch* gave the order for *Tippel;* the goods were sent to *Tippel's* house, and the entry made in his name. There is no colour for making *Gooch* the debtor."(*d*)

The following case is an authority in confirmation of the same principle. *Stamper* had furnished lace for the King's hunt, according to the order of one *Graham*, master of the hunt to King James the Second, and upon the departure of the King brought an action against *Graham* for the amount, in which he recovered. *Graham* filed a bill for relief. It appeared by the day-book of *Stamper* that he had also an account with *Graham*, which was kept separate from that on account of the King; that the articles furnished for the King's use were entered without price, that it

(*d*) *Owen* v. *Gooch*, 2 Esp. 567.

might be added in the ledger according to the prospect of payment; declarations were also proved by him that he expected payment from the privy purse. The Court held that if the law should be, that he that speaks for or fetches goods for his master, without any particular promise to pay for them, is liable to pay for them, which they seemed to doubt, yet on these circumstances the plaintiff is entitled to relief.(*e*)

2. In order, however, to confine the credit to the principal, it is in general necessary that he should be known as the responsible person.(*f*) And therefore an agent may become liable upon contracts made by him in that capacity; *first*, where the principal is not known; *secondly*, where there is no responsible principal (except in the case of public agents); *thirdly*, where he becomes liable by any undertaking of his own.(*g*)

First, Where the principal is not known. After a verdict obtained by the vendor of goods a motion was made for a new trial, on the ground that though the goods were sold to the defendant, yet it was for the use of another, and that the receipts were so. But the Court declared, that if a factor or servant buy goods generally, and do not upon the contract declare that he buys only as a factor,

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(*e*) *Graham* v. *Stamper*, 2 Vern. 146; Eq. Ca. Ab.
(*f*) 12 Ves. 352.
(*g*) *De Gelder* v. *Savory*, 2 Keb. 812.

or servant, he is chargeable in his own right; and judgment was given for the plaintiff. And in all cases where a factor delivers goods as his own, and conceals his principal, he is to be taken to all intents as the principal.(*h*) This notification of the principal must be at the time of the contract. It is not sufficient — for the purpose of discharging the agent — to make it afterwards. Thus, in an action for the non-delivery of goods, it appeared that the defendant had entered into and signed a written contract, engaging to deliver certain goods to the plaintiff, which he had failed to do. The defence was, that the defendant was merely a factor, and that this was known to the plaintiff before the action brought, but subsequent to the contract. Lord Ellenborough was of opinion that the defendant was liable, the principal not having been notified at the time, and no subsequent act being done to show that the plaintiff waived the liability of the defendant, and relied upon the principal [alone]. (*i*) And though it be known that the agent acts in a representative character, yet, if the principal be not known, he is bound personally. Thus, an auctioneer, who did not disclose his principal at the time of the sale, has been held personally liable,

(*h*) Per Lord Mansfield, 7 T. R. 350; ante, p. 280.
(*i*) *Morgan* v. *Corder*. Sittings after Easter Term, 1809. Guildhall.

upon the non-execution of the contract of sale.(j)

Factors, ↓ who are agents of merchants ↓ resident abroad, are, for the same reason, generally liable in their own persons, for the credit is presumed to be given to them.(k) However, if a factor load goods on board a ship generally, the principals and the lading, but not the factor himself, are liable for the freight.(l)

[But where a bill of lading, which directs the goods to be delivered *to order, or to assigns paying freight*, is indorsed by the consignee to his agent, the latter is liable for the freight, although he may have paid over the proceeds to his employers before the freight was demanded of him.](1) ↓ And the rule applies equally, though the words "or to assigns" do not appear in the bill of lading, on

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(j) *Hanson* v. *Roberdeau*, Peake, N. P. C. 120.

(k) Bull. N. P. 130; ↓ *De Gaillon* v. *L'Aigle*, 1 B. & P. 368, per Eyre, C. J.; *Paterson* v. *Gandasequi*, 15 East, 62; *Thomson* v. *Davenport*, 9 B. & C. 78; Dan. & Lloyd, 278; ante, p. 249. ↓

(l) 2 Moll, 381. ↓ The rule is stated by Lord Tenterden, in "The Treatise on Shipping," thus: "If a consignee receive goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he, by such receipt, makes himself debtor for the freight, and may be sued first. But a person, who is only an *agent* for the consignor, and who is known to the master to be acting in that character, does not make himself personally answerable for the freight by receiving the goods, although he also enters them in his own name at the Custom House." 5th ed. 286. ↓

(1) [*Bell* v. *Kymer*, 5 Taunt. 477.] ↑ *Dougal* v. *Kemble*, 3 Bingh. 383. ↓

the ground that "if a person accept any thing which he knows to be subject to a duty or charge, it is rational to conclude that he means to take that duty or charge on himself; and the law may very well imply a promise to perform what he so takes upon himself."(2) ↓ [It does not, however, seem to apply to a case where the goods are delivered, not on the bill of lading, but upon an express order from the principal to deliver them to the broker, notwithstanding the broker may, at the time, be indorsee of the bill of lading, unless, from the general habit of dealing between the parties, an implied promise, on the part of the broker, to pay the freight, can be raised.(3)]

2. Secondly, Persons, though contracting only as agents, are nevertheless generally liable where there is no responsible principal to resort to. As in the following instances: An act of Parliament was passed for making a river navigable, giving power to certain commissioners to raise and borrow money upon the tolls of the navigation. The acting commissioners gave orders at their meetings for work to be done in making outs, &c. The work being completed, the commissioners declined paying, alleging that they had no trust-money left. The plaintiff brought his bill against all the acting commissioners: when the Court of

(2) ↓ *Renteria* v. *Ruding*, Lloyd & Welsby, 274. ↓
(3) [*Wilson* v. *Kymer*, 1 M. & S. 157.]

Chancery(*m*) declared the commissioners who acted under the trust to be personally liable to all the contracts, as well those which were made at the meetings when they were not present, as at those when they were. It was said by the Court, that the commissioners had power to borrow money, and ought to take care to be provided. That the workmen who engaged to do the work could not know the state of the fund, nor was it their business to inquire: they gave credit to the commissioners: the plaintiff could not be considered as giving credit to the success of the undertaking.(*n*)

Again: A. agreed with B. and C. to pave their streets in *Putney:* and they, on behalf of the parish, agreed to pay him. The work being done according to the agrement, A. filed a bill against B. and C., and it was held that they were liable, and must take their remedy over against the rest of the parish.(*o*)

(*m*) Lord Bathurst, assisted by Mr. Justice Gould and Mr. Justice Ashhurst.

(*n*) *Horsley* v. *Bell and others*, Ambl. 769, 772.

(*o*) *Myriel* v. *Hymondsold*, Hardr. 205. So it was holden that a bill might be supported against the committee of a club for an agreement entered into by them, on account of the club, without making the rest of the subscribers parties. *Cullen* v. *The Duke of Queensbery*, 1 Br. Ch. Rep. 101, affirmed D. P. March 27, 1787. So where the commissioners of a navigation act entered into an agreement with an engineer, they were holden to be personally liable; *Horsley* v. *Bell*, Ambl. 770; 1 Br. Ch. R. 101,

This rule, however, is subject to one exception, which is, the case of *agents of Government*, acting in that capacity for the public, who, from the supposition that their office excludes the presumption of credit being given to them personally, are not held liable for the contracts made by them merely in their public capacity, although there be no other person against whom a legal remedy lies to enforce the contract. An agent of Government, known to act merely in that capacity, and not making himself liable by any

in note. [In an anonymous case in 12 Mod. 559, it is reported to have been held by Lord Holt, that "if an overseer of the poor contract with tradesmen upon account of the poor, and upon his own credit, as soon as he receives so much of the poor's money, it becomes his own debt."] ↓ In *Eaton* v. *Bell*, 5 B. & A. 34, commissioners under an inclosure act were held personally responsible upon bills drawn by them upon their bankers in the following form: "Fordham Inclosure, Oct. 15, 1810. Messrs. ——, pay to J. M. or bearer, £ ——, on account of the public drainage, and place the same to our account, *as commissioners* of the above inclosure;" and see post.

A person attending a vestry meeting, and together with other parishioners authorizing repairs of the church, is not liable to an action of assumpsit for contribution at the suit of the churchwardens, by whom those expenses have been defrayed; *Lanchester* v. *Tricker*, 1 Bingh. 201; *Lanchester* v. *Frewer*, 2 Bingh. 361. But it has been lately decided, that a member of a committee for managing the affairs of a charitable institution, though giving his services gratuitously, is liable personally for goods supplied by tradesmen to the use of the institution, though not shown to have given any orders, and not even known to the tradesmen as a member; *Burls* v. *Smith*, 7 Bingh. 705; and see *Doubleday* v. *Muskett*, Ib. 110. ↓

thing amounting to a personal contract, is not answerable for articles furnished by his order.(p) And it has been laid down that in any case where a man acts as agent for the public, and treats in that capacity, there is no pretence for making him personally liable.(q) The *Governor of Quebec*, by whose order various articles had been supplied for the use of the settlement, was deemed not to be answerable personally for the price of them.(r) And a *commissary* general has been held not liable for forage supplied by his order.(s) The same principle has been extended to the case of a commander of a ship of war, who, having by a charter-party covenanted *on account of the King* for the performance of certain articles, was held not to be liable in an action upon that covenant.(t)

(p) *M'Beath* v. *Haldimand*, 1 T. R. 172. [It was decided in *Bowen* v. *Morris*, 2 Taunt. 374, that the mayor of a corporation, who, on the sale of certain lands by auction, of which the corporation were vendors, contracted on the behalf of the corporation, and mutually with the purchaser, for the due performance of the conditions of sale, could not, in his individual capacity, maintain an action against the purchaser for a breach of his contract,] ⟂ on the ground that as he acted avowedly in the capacity of agent for the corporation, he would not be personally liable on the contract; and Mansfield, Ch. J. said, that the case was within the principle of *M'Beath* v. *Haldimand*. ⟂

(q) 1 T. R. 180. (r) 1 T. R. 172. (s) 1 T. R. 180.

(t) 1 T. R. 674. Vide 1 East, 135, 579. A commanding officer, present with his troop, is liable for subsistence furnished to his men, if he have actually received money from the pay-

3. Thirdly, Agents are liable upon contracts made on behalf of their principals, where they individually bind themselves by their own undertaking. As in the following cases:—

An agent by writing acknowledged to have received goods for his employer, and by the same writing bound himself to pay at a day certain, it was held by all the judges that assumpsit would lie against him.(*u*) So upon a memorandum by a servant in this form,(*w*) "Received of J. S. to the use of my master, the sum of 40*l*. to be paid at Michaelmas following," the servant was held liable.

A servant retained an attorney for his master and promised he should have his fees. The attorney recovered against the servant in an action of debt. (*x*)

A bill of exchange drawn upon an agent and accepted by him, generally binds him, at least against a third person. The cashier of the York

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master, but not otherwise; unless perhaps where he is liable for the default of the paymaster by being his surety, or indebted to him on a private account. ⫰ See *Thompson* v. *Pearce*, 1 B. & B. 25. ⫰

(*u*) Dy. 230 a.

(*w*) *Talbot* v. *Godbolt*, Yelv. 137; 4 B. Ab. 88.

(*x*) *Haines* v. *French*, Aleyn, 6. According to Roll, C. J. who cites the case, after judgment for the plaintiff in C. B. a rule was given to reverse it in B. R. notwithstanding the like judgment in *Bradford's case*: but he said the judgment was not reversed on the roll, and in his opinion it was good.

Buildings' Company, to whom a bill was addressed by the name of *J. B. cashier of the York Buildings' Company*, and by him accepted generally thus, "accepted, J. B." was held liable to the payee.(*y*) But it was said that, perhaps, he would not be so to the drawer, who knew that the bill was drawn and accepted on account of the company.(*z*) ⸸ However, in a subsequent case, where an agent of a country bank, to whom a sum of money had been remitted by the plaintiff for the purpose of procuring a bill on London, drew in his own name for the amount on the firm in London, the two firms being the same; it was held that he was liable on this draft to the plaintiff, although the latter knew that he was agent, and supposed the bill to be drawn by him as such, and on account of the country bank to which the agent had paid over the money remitted; and the decision proceeded on this plain ground, that a written instrument cannot be explained by matter dehors.(4) ⸸ So where a merchant drew upon his factor in these terms, "Pay to Messrs. M. and Co., or order, 195*l.* out of the

(*y*) Str. 955. (*z*) Id. ib.

(4) ⸸ *Leadbitter* v. *Farrow*, 5 M. & S. 345; and see *Eaton* v. *Bell*, ante, note (*o*). In one instance, however, where an agent was sued as indorser of bills by the indorsees, who knew that he had indorsed them as agent merely, and that he was under the necessity of doing so, an injunction was granted to restrain the action at law. *Kidson* v. *Dilworth*, 5 Price. 564. ⸸

produce of my goods, now lying at Gibraltar, &c. as soon as the same shall come to your hands, after paying the present acceptances:" to which the factor underwrote, "I agree to conform to this order," it was decided that he was liable to the holder, having received assets, though the balance of accounts between him and his principal was in his favour.(a) Thus also on a bill drawn upon an agent to be paid out of the drawer's half-pay when due, and which the agent promised to pay when he received any money of the drawer's, he was held liable upon proof of the receipt of money to the amount of the bill, though the balance of accounts was in his favour.(b)

[So, as between himself and the principal, the agent, by drawing or accepting a bill generally, may render himself liable to the principal for the amount. Thus, where a broker procured a purchaser for goods, and drew a bill for the amount, payable to the principal, which was accepted by the purchaser, but dishonoured; it was held, that the broker was answerable as drawer of the bill, on the acceptor's default.(5)]

(a) 2 Bl. 1072.

(b) 5 Esp. 247. His lordship mentioned a case in which Lord Kenyon, under similar circumstances, had held that such an acceptance was an appropriation of so much to the use of the holder, and made the acceptor liable upon the receipt of any money upon the credit of which it was drawn.

(5). [*Le Feuvre v. Lloyd*, 1 Marsh. 318; 5 Taunt. 749, S. C.]

[An agent purchasing foreign bills for his principal, and indorsing them to him without any qualification, is liable to the principal on his indorsement, however small the commission may be which he gets upon the purchase.(6)]

So upon contracts of every description entered into by agents on behalf of their principals, as well by public agents as by others, if they bind themselves by a formal engagement, they are answerable in their own persons.(*c*) Thus if a factor enter into a charter-party in his own name, the contract obliges him for the freight; though when he loads aboard generally he is not liable.(*d*)

ǂ So where a person, describing himself as "agent and consignee" of a vessel, entered into an agreement in his own name, "witnessing that the said parties thereto had agreed," &c. he was considered personally liable on the agreement.(7)

In like manner, an agent for the consignee of the cargo of a chartered vessel, who, in order to obtain possession of the goods from the ship-owner, guaranteed to pay all charges and to stand in all respects in the place of the charterer, was held to be personally answerable for demur-

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(6) [*Goupy* v. *Harden*, 7 Taunt. 159.]
(*c*) Per Ashhurst, J. 1 T. R. 181.
(*d*) 2 Moll. 381; 2 Atk. 623.
(7) ǂ *Kennedy* v. *Gouveia*, 3 D. & R. 503. ǂ

rage, and that not only for the days which had run since the agreement, but for the whole.(8)

A fortiori therefore an agent of foreign merchants was held bound by his guarantee, that the shipment should be made in conformity with the laws of Great Britain.(9)

So an agent who bought goods, and remitted bills for the price, which, though he did not indorse, he undertook to see paid, was considered as having made himself personally responsible for the goodness of the bills.(10)‡

A broker employed to sell goods taken in execution having promised the landlord, in consideration of his withdrawing his distress, to pay him the rent, was held to be personally liable; and that the promise, being an original undertaking, was not required to be in writing.(*e*)

One who covenanted for himself, his heirs, &c. under his own hand and seal, for the act of another, was adjudged to be personally liable, though he described himself in the deed as covenanting for and on the part and behalf of such other person.(*f*). So a bond recited that diffe-

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(8) ‡ *Benson* v. *Hippius*, 4 Bingh. 455. ‡

(9) ‡ *Redhead* v. *Cator*, 1 Stark. N. P. C. 14. ‡

(10) ‡ *Morris* v. *Stacey*, Holt, N. P. C. 153. ‡

(*e*) 3 Burr. 1886.

(*f*) *Appleton* v. *Binks*, 5 East, 148. In the case of *Cass* v. *Rudell*, 2 Vern. 280, the defendant, *on behalf of J. T.*, articled to purchase an estate in Jamaica, and covenanted on behalf of J. T. to pay 800*l*. On a bill filed for a specific performance of

rences subsisted between I. F. and the plaintiff, and was conditioned to be void, if G. F., the defendant, for and on behalf of I. F., should perform the award of arbitrators. The award was made directing that the defendant should pay a certain sum, and that plaintiff and defendant should execute general releases. It was determined that the submission bound the defendant, and that the award was good.(*g*)

And in a similar case, the bond recited that there were controversies between the plaintiff and the defendant as attorney for D.; and the condition was, that the defendant should perform the award of arbitrators. In this case also, the submission was held to be binding upon the defendant; but judgment was given against the plaintiff, because the award directed that the plaintiff should give a release to the use of the defendant, which ought to have been general, or to the use of the principal, according to the submission.(*h*)

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these articles, defendant insisted that he had not sufficient effects of J. T. in his hands, and that the performance of the agreement had been delayed by the plaintiff not making out a good title, and during the pendency of the suit the estate had been swallowed by an earthquake. But the Court of Chancery, notwithstanding the estate was gone, and the defendant had not sufficient effects of J. T., decreed a specific execution of the articles.

(*g*) *Clayhill* v. *Fitzgerald*, 1 Wils. 28, 58.

(*h*) *Bacon* v. *Dubary*, 1 Ld. Raym. 246; 1 Salk. 70, S. C.

‡ An agreement was entered into in this form: Memorandum of agreement made, &c. between George Herron, on behalf of Edward Barron, of, &c. of the one part, and James Norton, of the other part; viz. first, the said George Herron doth hereby agree to execute unto the said J. N. a lease of, &c. And it was held, that Herron was liable personally for non-execution of the lease.(11)

But the agent is not liable even upon a writ-

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‡ Attornies are not in general personally liable on engagements entered into by them on behalf of their clients, *Hartop* v. *Juckes*, 2 M. & S. 438; *Hart* v. *White*, Holt, N. P. C. 76. They may, however, render themselves so by the form of the engagement. Thus, where the solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay the landlord his rent;" it was held, that they were personally bound by this undertaking, *Barrett* v. *Jones*, 3 B. & A. 47. And again, where the several attornies for the plaintiff and the defendant, in a cause which stood for trial, entered into an agreement whereby they personally agreed that the record should be withdrawn, and that certain things should be done, by way of settlement of the dispute, by the plaintiff and the defendant, and that costs should be taxed for the defendant in a certain manner; it was held, that the plaintiff's attorney was bound to pay the costs when taxed accordingly, *Iveson* v. *Conington*, 1 B. & C. 160.

And if the attorney has given directions for certain business to be done, with the knowledge and consent of his client, it is a question for the jury, whether the business has been done on his credit or on that of the client; and if found to have been done on the credit of the attorney, he will be personally liable, *Strace* v. *Whittington*, 2 B. & C. 11; and see *Kendray* v. *Hodgson*, 5 Esp. 228. ‡

(11) ‡ *Norton* v. *Herron*, Ry. & M. 229. ‡

ten undertaking formally given, if it appear on the face of it that he was acting as agent, and the principal subsequently annex to the same undertaking his own ratification of it. Thus, where Lavender, an auctioneer, entered into an agreement, as agent for and on the part and behalf of S. R., and signed it, and at the foot were added these words, "I hereby sanction this agreement, and approve of C. Lavender having signed the same on my behalf," it was held, that Lavender was not personally responsible. (12) ⸸

Agents may also render themselves personally responsible upon contracts by express warranty of soundness, title, and the like. It is laid down,(*i*) that if a servant make an express warranty; as if a servant lease land for his master, reserving the rent to his master, and to invite the lessee to take the lease, promise that he shall enjoy it without incumbrance; if the land be incumbered, an action lies against the servant. Upon the sale of goods, a warranty by a known broker, agent, or servant, made pursuant to his authority, will not subject him to answer personally, unless his own responsibility appear by the terms of the warranty to

(12) ⸸ *Spittle* v. *Lavender*, 2 B. & B. 452. ⸸

(*i*) 1 Roll. Abr. 95, pl. 30. It is said, however, 2 Roll. Rep. 270, that a warranty on sale must be made by him who sells; and therefore if a servant or apprentice, upon sale of goods for his master warrants them, it will be a void warranty; for it is the sale of the master.

agent warrant goods without authority, he only is liable to the buyer.

6. It has been said, that by the general rule of law, agents properly authorized, contracting for a known responsible principal, without any personal undertaking, are not liable individually. But an exception is to be made in the case of masters of ships, who, though known to contract for the owners of the ship, and not for themselves, are nevertheless, as it is now settled, liable for the contracts they make for repairs, &c. unless they take care to avoid that responsibility by the express terms of the contract.(*q*)

7. Another case in which agents are personally responsible is, where money has been paid to them for the use of their principal, under such circumstances that the party paying it might recover it back from the latter. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal *fresh credit* upon the faith of it, it may be recovered from the agent.(*r*) For the payer has his option either to consider the payment as made to the principal, or may charge the agent

(*q*) *Rich* v. *Coe*, Cowp. 36. ‡ But if the repairs were done under circumstances which show that credit was given to the owners and not to the master, the latter will not be liable. *Hoskins* v. *Slayton*, Ca. temp. Hardw. 376. ‡

(*r*) *Buller* v. *Harrison*, Cowp. 565. *Cox* v. *Prentice*, 3 Maule and Selw. 344.

himself who holds it for his use.(s) Nor is it sufficient that the agent has passed the sums received to the principal's account, giving him credit for it as paid in discharge *of a debt* due to himself.(t)

It seems, however, that the right to recover against the agent is to be understood with some qualification. For it has been held that an action will not lie against a mere collector or receiver, for the purpose of trying a right in the principal, even though he have not paid over the money. It is said, in one case,(u) that if the defendant can show the least colour of right in his principal it is sufficient. And Lord C. J. Lee declared, that the right to an inheritance should not be tried in an action for money had and received brought against the receiver.(w) In a case where the question was much considered, it was held that an action could not be supported against a steward for quit-rent *voluntarily* paid, in order to bring the lord's right in question, but that it must be against the lord.(x)

(s) *Carey* v. *Webster*, Str. 480.

(t) *Buller* v. *Harrison*, Cowp. 565. *Cox* v. *Prentice*, 3 Maule and Selw. 344.

(u) *Staplefield* v. *Yewd*, Bull. Ni. Pr. 133.

(w) *Staplefield* v. *Yewd*, cited 4 Burr. 1985.

(x) *Sadler* v. *Evans*, 4 Burr. 1984; and see post, note (b). It is said by Lord Kenyon, 4 T. R. 555, to have been decided by this case, that an action for money had and received will not lie against any known agent; but that the party must resort to the

8. In general, if the agent have paid over the money to his principal, (except in some instances, afterwards noticed, where the authority is wholly void,) the remedy is against the latter only.(y) For, it is said by Lord Mansfield, the law is clear that if an agent pay over money which has been paid him by mistake, he does no wrong, and the plaintiff must call on the principal.(z) (14)

And it has been held sufficient in an answer to a bill in chancery for the defendant to swear that he received the sums to be accounted for as a ser-

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superior. But the principles of the case do not appear by the report to be so extensive; and the general doctrine appears to be contradicted by the cases above referred to. Though the opinion of Mr. Baron Perrot at the trial of the case of *Sadler* v. *Evans*, viz. that if the action were maintainable or not according as the fact of the money being paid over should appear at the trial, this kind of action would be a trap for the plaintiff, appears to apply to the action in every case where it is brought against a known agent.

(y) 1 Str. 480.

(z) Cowp. 568; *Horsfall* v. *Handley*, 8 Taunt. 136.

(14) [But an agent cannot defend himself on the ground of having paid over the money, unless it appear that the money was paid to the agent *for the purpose of paying it to the principal* (as was the case of *Sadler* v. *Evans*, where the money was paid to the agent of Lady *Windsor* for Lady *Windsor*'s use); for it was holden that one who had paid a sum of money to a bailiff, exceeding his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should be delivered over to any one in particular, might maintain an action for money had and received against the bailiff, although he had, in fact, paid the money over to the sheriff, and the sheriff to the exchequer. *Snowdon* v. *Davis*, 1 Taunt. 359.]

vant, and had paid them over, or laid them out, by order of his master.(*a*)

So one who had erroneously paid a sum by way of duty to a revenue officer failed in an action against the officer, upon proof by the latter that he had paid the money over to his superior.(*b*)

Thus also where A. had paid money to B. to be paid to C. as a consideration for C.'s signing a bankrupt's certificate; in an action brought by A. against B. to recover back the money, the plaintiff was nonsuited, upon proof that the defendant had applied the money according to the purpose intended.(*c*)

But if an agent be put in the condition of a stakeholder, he is bound to keep the deposit till the conditions are fulfilled upon which it is to be paid: and therefore payment over is no defence, if such payment were premature. This is the case with auctioneers, who ought to retain the deposit money till the title is made out; and upon

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(*a*) 1 Vern. 136, 208.

(*b*) *Greenway* v. *Hurd*, 4 T. R. 553. It may be questioned whether this action could have been supported, even if the money had not been paid over. For Lord Kenyon puts this upon the same footing as the case of *Sadler* v. *Evans*, 4 Burr. 1984, *ante*; and in *Whitbread* v. *Brooksbank*, Cowp. 69, it was said by the Court, that an action for money had and received will not lie against an excise officer for an overpayment. ‡ But see *Snowdon* v. *Davis*, supra. ‡

(*c*) *Smith* v. *Bromley*, Dougl. 696.

failure of the vendor to make out a title, it may be recovered from the auctioneer, though he have paid it over. (*d*) (15) And a payment over, after *notice* to withhold the money, will not protect the agent in those cases where he would be liable if it were in his hands: for if after notice he choose to make himself judge between the parties, he then stands in the condition of a principal. (*e*)

To make the fact of payment over to the principal available as a defence to the agent, the payment must be to the real principal, and not to a person falsely assuming that character. Thus, if an attorney bring an action, and recover a sum of money on the retainer of a person pretending to act under a forged power of attorney from the party really entitled, and pay over the money

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(*d*) 5 Burr. 2639

(15) [Where a person, who acted in the twofold character of attorney and auctioneer for the vendors, paid over the deposit to his employers, with a knowledge that the title was disputable, he was held liable, on the vendors not making out a good title to the purchaser, in an action for money had and received, brought to recover back the deposit, the money having been paid in his own wrong. *Edwards* v. *Hodding*, 1 Marsh. 377; 5 Taunt. 815, S. C.]

(*e*) An auctioneer who sold goods, after notice that they were not the property of his employer, was held liable to pay the money for which they had sold. In which case it was laid down, that though in general the title of the principal cannot be tried in an action against the agent, yet by persisting after notice the auctioneer had made himself *quasi* a principal. *Hardacre* v. *Stewart*, 5 Esp. Cas. 103.

recovered to the person thus employing him, he is liable to refund to the party who paid the money under that process, and who may afterwards be called upon and obliged to pay it over again to the true creditor.(*f*) But an agent, employed to collect the debts of a testator by one who had been appointed administrator before the will was found, has been held not liable to the executor for sums so received by him, and *paid over* to the administrator.(*g*)

An exception to the rule that an agent is not liable after payment over is found in the following case. A gaoler claimed to retain out of a sum which he owed to one who had been his prisoner, the sum of a guinea per week as the rent of a room which the plaintiff had been permitted to occupy during his imprisonment. The gaoler had no authority to make such a bargain, though he accounted with the county for the guinea a week. Lord Kenyon said, "I think this action may be maintained. I am aware that it has been holden

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(*f*) 1 T. R. 60.

(*g*) *Pond* v. *Underwood*, 2 Ld. Raym. 1210. See *Jacob* v. *Allen*, 1 Salk. 27, contra. But this last case was disapproved by Lord Mansfield, 4 Burr. 1984, who assented to the authority of *Pond* v. *Underwood*. And see *Allen* v. *Dundas*, 3 T. R. 125, payment to one having probate of a forged will is good; for the authority of a court having competent jurisdiction is valid till revoked; but *aliter* if the supposed testator be living at the time of probate, for then the court has no jurisdiction. *Vide* also 1 Ld. Raym. 762; ‡ and this seems to be the better law. ‡

in the case of *Sadler* v. *Evans*, (4 Burr. 1984,) that an action cannot be brought against an agent for money received to the use of his principal; but in that case there was nothing corrupt in the foundation. This agreement is one of those which the law will not allow. Besides, the county cannot be sued. Therefore I am of opinion that the plaintiff, notwithstanding this money has been paid over to the county, is entitled to recover.(*h*)

An agent who has received money from his principal to pay to a third person, is liable to the latter in an action for money had and received, or of debt.(*i*) But if money be paid by the acceptor of a bill of exchange to an agent for the purpose of taking it up, the agent, in an action brought against him by the holder, may avail himself of the same defence which the acceptor could have done, as that the holder received the bill by indorsement of the drawer after an act of bankruptcy committed by him.(*k*)

[In order to render the agent liable to a third person, there must be a specific appropriation of the money to the use of such third person ┼ assented to by the agent. ┼ For although bills

(*h*) *Miller* v. *Aris*, 1 Selwyn, Ni. Pri. [illegible]3. See also *Townson* v. *Wilson*, 1 Camp. N. P. Cas. 396; ┼ and *Watkins* v. *Hewlett*, 1 B. & B. 1. ┼

(*i*) 2 Rol. Rep. 441.

(*k*) *Redshaw* v. *Jackson*, 1 Camp. N P. C. 372.

be remitted to an agent, accompanied by directions to pay the amount in certain specified proportions to the creditors of the remitter; yet if the agent, on the application of a creditor, refuse to hold the bills for the purposes directed, he is not liable (after having thus repudiated the agency) to a creditor for the amount of his debt, because there is no privity either express or implied between them; and by the mere act of receiving the bills, the agent only agrees to hold them until paid, and their contents, when paid, for the use of the remitter.(16) So, although money be remitted by the acceptor of a bill to his agent for the purpose of taking up the bill, and the agent, on application, finds that the bill has been returned to his correspondent as dishonoured, it is afterwards competent to the remitter to recal the money, and to make a new appropriation of it; and the agent, upon the bills being reprocured and tendered to him for payment, is not liable, since this was not such a specific appropriation of the money as to render the agent a trustee for the holder of the bill.(17)]

(16) [*Williams* v. *Everett*, 14 East, 582. See also *Grant* v. *Austin*, 3 Price 58;] ╋ *Yates* v. *Bell*, 3 B. & A. 643; *Scott* v. *Porcher*, 3 Meriv. 652; and *Wedlake* v. *Hurley*, Lloyd & Welsby, 330. ╋

(17) [*Stewart* v. *Fry*, 7 Taunt. 339:] ╋ and see *Gibson* v. *Minet*, 2 Bingh. 7, that if after countermand the agent pay the money over, he is liable to his principal. ╋

SECTION 2.

Liability of Agents for their own tortious Acts.

In considering how far agents are liable individually to third persons for *wrongs* done in the course of their employment, it is necessary to resort to general rules derived from the law of masters and servants; though it is not proposed in this treatise to enter particularly into that subject.

1. Servants are responsible for tortious acts, whether done by authority of their masters or not. (*a*) But for mere non-feazance or non-performance of a duty, servants are not liable to third persons, but only to their masters. For there is no privity of consideration between the servant and the person who employs his master; and non-feazance alone will not support an action without consideration, (*b*) though misfeazance will. We find the principle thus stated by Lord C. J. Holt: "A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it: but for a misfeazance an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrong doer." (*c*) This doctrine has been repeated and ratified in a subsequent case. (*d*)

Thus if A. deliver a horse to a smith to shoe,

(*a*) Post. (*b*) Ante. (*c*) 12 Mod. 488

(*d*) Sayer, 41. It is said by Lord C. J. Holt, 12 Mod. 488,

and he deliver him to another smith who pricks him, A. may have an action on the case against the latter, though he did not deliver the horse to him. (e) So if one deliver goods to A. to keep, who delivers them to B. to keep to the use of A., and B. waste them, the owner may have an action on the case against B. (f)

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that "if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner to escape by neglect, the sheriff shall be charged and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer or rescuer." In *Bell* v. *Catesbie*, Roll. Abr. 94. pl. 5, it was resolved, that if an underbailiff of a liberty levy a debt by virtue of a warrant of *fieri facias*, and then conceal the writ, and make no certificate, an action on the case lies against him; for this reason, that he has done a personal tort, Vid. 1 Vin. Ab. 573. In *Marsh and Astrey's* case, 1 Leon. 116, an undersheriff was held liable for returning a tenant summoned when he was not, upon the ground that this was a positive act, and not a mere negligence. And see Dr. and St. c. 42. p. 280. However in *Cameron* v. *Reynolds*, Cowp. 403, it was held, that an action did not lie against an undersheriff for refusing to execute a bill of sale to plaintiff under a *fieri facias*. And Lord Mansfield said, "It is an action for a breach of duty in the office of sheriff. Wherever that is the case, the action must be against the high sheriff: and if it proceed from the default of the undersheriff, or bailiff, that is a matter between them and the high sheriff." (1)

(e) Roll. Abr. 90. It is said, 1 Black. Com. 430, if a smith's servant lame a horse while he is shoeing him, an action lies against the master, and *not against the servant*. Quære the latter part of the proposition, if the injury arise from actual misfeasance.

(f) Roll. Abr. 90.

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(1) There is no contradiction between the two cases.—The one was an action for doing something which he ought not to have done; the other for not doing something which he ought to have done.

2. The case of masters of ships who, though in some respects the servants of the ship owners, are held liable to the owners of the goods put on board for negligence, rather admits than contradicts the principle of this rule. For in the case which decided that point, (*g*) to the objection that the master was but a servant to the owner it was answered, that the law takes notice of him as more than a servant; he may impawn the ship, and sell *bona peritura:* he is rather an officer than a servant. (*h*)

3. Servants are bound to obey only the lawful commands of their masters; and it is laid down as a rule, that in every case where the master has not power to do a thing, whoever does it by

(*g*) *Morse* v. *Slue*, 1 Vent. 238.

(*h*) Other cases may be adduced to show that a deputy, though he be nominally the servant of another, yet if he be really a distinct officer, is liable for negligence in his office as much as if he were to all intents the principal. The case of *Rowning* v. *Goodchild*, 3 Wils. 151; 5 Burr. 2721, was an action against the deputy post-master of *Ipswich*, for negligence in not delivering a letter. One objection made for the defendant was that he was only a deputy, and that the action should have been against the postmaster-general, 3 Wils. 451, 454. But the Court (admitting, as it seems, the general principle upon which the objection was founded) held the action maintainable, "for the deputy postmasters are subsisting substantial officers, and answerable for their own misfeazances and nonfeazances. They have original offices under the postmaster-general." It seems to be upon this principle that it is laid down by the Court, 1 Vent. 238, that the gaoler may be charged for an escape, though the sheriff be also liable; but the turnkey cannot, for he is a mere servant.

his commandment is a trespasser as well as the master. (*i*)

An agent, like any other servant, is personally liable for any tortious act committed by him in the course of his employment; (*k*) and is liable for an actual misfeazance, notwithstanding that it was committed in submission to the authority of his employer. In an action of trover a special verdict was found in substance as follows: viz. that one H. was possessed of the goods in question, and became a bankrupt; that the plaintiff was chosen assignee; and that the defendant as servant and clerk to one G., a creditor of the bankrupt, applied to the bankrupt, after the act of bankruptcy, for payment of the debt; when the bankrupt delivered the goods in question to the defendant, who gave a receipt for them in the name of his master, and sold them for his mas-

(*i*) 8 E. 4. 45, per Choke. In *Michael* v. *Alestree*, 2 Lev. 172, a servant was held to be jointly liable with the master in an action of trespass for an injury done by training unruly horses in a public place; and see *Wyne* v. *Ryder*, 2 Mod. 67. In 22 E. 4. 45. it is said, per Jenny, if a master lock a man into his house and deliver the key to his servant, if the servant be ignorant that any body be there, he is not chargeable; but if he know that the master had imprisoned one tortiously, and he still kept him in prison, he is liable to an action. However, a mere servant is said not to be liable to an action for a fraud in his master's business. Thus it is laid down, Roll. Abr. 95, that if the servant of a taverner sell wine that is corrupted, knowing it to be so, no action of deceit lies against the servant, for he did it but as a servant.

(*k*) 12 Mod. 448.

ter's use. The question was, whether the action could be maintained against the servant, who acted wholly for his master, and by his authority. The Court of King's Bench were unanimously of opinion that it was well brought; and Lord C. J. Lee said, "The point is, whether this defendant is not a wrongdoer; for if he be so, no authority that he can derive from his master can excuse him from being liable in this action.(*t*) But a broker who sells goods after a sale by the principal, though it be held that the principal's sale supersedes his, yet is not liable in trover for de-

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(*t*) 1 Wils. 328. *Perkins* v. *Smith*, Say. 41, S. C. In the case of *Mires* v. *Solebay*, 2 Mod. 212, which does not appear by the reports to have been noticed in *Perkins* v. *Smith*, it is said to have been expressly decided, that *trover* would not lie against a servant for an unlawful intermeddling with the goods of another by command of his master, unless it amount to a trespass; and then it was agreed an action of trespass would lie against him. But this doctrine is not only contradicted by *Perkins* v. *Smith*, but is in opposition to what is elsewhere laid down, viz. "that any disposing of another's property, without his authority, is a conversion." 6 Mod. 212; 6 East. 540. There were likewise other grounds upon which the judgment might have proceeded, viz. that the taking the cattle, which was the ground of the action, was under a replevin; and also that the special verdict did not expressly find a conversion. Accordingly [in the case of *Stephens* v. *Elwall*, 4 Mawle & Selw. 259, it was decided, that a servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.] ┼ But a mere refusal by a servant to deliver goods, the property of the party requiring them, will not be such a conversion as will render the servant liable, if the refusal be qualified by a declaration that he cannot deliver them without the authority of his master. *Alexander* v. *Southey*, 5 B. & A. 247. ┼

taining the goods without notice of the sale, for there is no conversion. (*m*) There are, however, cases in which the employer alone, and not the agent, may be liable for a wrong done. As if an attorney, by direction of his client, bring an action, however groundless or vexatious it may be, he is not liable. (*n*) Even if he sue for a debt which he knows to be released, and was himself witness to the release, yet it has been held that no action lies against him. (*o*) But though an attorney be not answerable for bringing a groundless action, yet he is responsible for mistakes in the conduct of it which produce a damage to the defendant. Where an attorney, employed to sue an administratrix upon a bond of the intestate, after judgment in the common form, arrested her on a *capias ad satisfaciendum*, sued out against her personally (without suggesting a devastavit,) he was adjudged to be liable in an action of trespass and false imprisonment. Though the officer executing the writ might have justified under it. (*p*)

(*m*) *Alwin* v. *Taylor*, Aleyn, 93.

(*n*) Per De Grey, C. J. 2 Bl. Rep. 867.

(*o*) Anon. 1 Mod. 210, per *totam curiam*; and see 1 Roll. Rep. 408; 2 Keb. 88. This case is referred to as law by Blackstone, J. in his report of the case of *Barker* v. *Braham*, 2 Bl. Rep. 869.

(*p*) *Barker* v. *Braham*, 2 Bl. Rep. 867. So if an attorney sue in an inferior Court, knowing that the cause of action is out of its jurisdiction, he is answerable; *Goodwin* v. *Gibbons*, 4 Burr. 2108. ‡ And see *Bates* v. *Pilling*, 6 B. & C. 38, ante. ‡

And though the principal who commands, as well as the agent who executes an unlawful act, be liable for it to the party injured, yet if the latter, in the execution of a lawful command, be guilty of an excess above his authority, he only is answerable for the consequences. (*q*)

4. No action lies against a manager, steward, or agent, for the negligence of those whom he has retained for the service of his principal; nor is a servant who hires labourers for his master liable for their acts. In these cases the action must be brought either against the hand committing the injury, or against the principal for whom the act is done; (*r*) unless the intermediate agent particularly order those acts to be done from whence the damage ensues. (*s*)

(*q*) Skinn. 228. pl. 7; Bac. Ab. tit. Master and Servant, L.; Noy's Maxims, c. 44. See also 9 Co. 76, *a*. Two cases are mentioned in which a servant is liable, and not the master, for acts done by command of the former; viz. if a lord command a servant to beat his villein, or a bailiff to distrain his tenant's cattle without cause, the villein or tenant, by reason of the respect and duty which belong to the lord, shall not have an action of trespass *vi et armis* against the lord, but he may against the servant or bailiff.

(*r*) *Stone* v. *Cartwright*, 6 T. R. 411; and see *Bush* v. *Steinman*, 1 Bos. & Pull. 404, ante, p. 296.

(*s*) Per Mr. Justice Lawrence, 6 T. R. 413.

APPENDIX.

No. I.

6 GEORGE IV. CAP. 94.

COMMONLY CALLED THE FACTOR'S ACT.

An Act to alter and amend an Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents. [5th July, 1825.]

6 G. 4, c. 83.

WHEREAS an Act passed in the Fourth Year of the Reign of his present Majesty, intituled "An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents: And whereas it is expedient to alter and amend the said Act, and to make further Provisions in relation to such Contracts or Agreements, as hereinafter provided:" Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, any person or persons intrusted, for the purpose of consignment or of sale, with any goods, wares or merchandize, and who shall have shipped such goods, wares or merchandize in his, her or their own name or names, and any person or persons in whose name or names any goods, wares or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares and merchandize to a lien thereon, in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares or merchandize shall be shipped, or in respect of any money or negotiable security or securities received by him, her or them, to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares and merchandize: Provided such consignee or consignees shall not have notice by the bill of lading for the delivery of such goods, wares or merchandize or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or persons so shipping in his, her or their own name or names, or in whose name or names any goods, wares or merchandize shall be shipped by any person or persons, is or are not the actual and bonâ fide owner or owners, proprietor or proprietors of such goods, wares and merchandize so shipped as aforesaid, any law, usage or custom to the coutrary

Factors or Agents having goods, &c. in possession deemed owners, so as to give validity to contracts with persons dealing bonâ fide upon the faith of such property,

Proviso as to notice,

and as to bill of discovery, &c.

thereof in any wise notwithstanding: Provided also, that the person or persons in whose name or names any such goods, wares or merchandize are so shipped as aforesaid, shall be taken, for the purposes of this act, to have been intrusted therewith for the purpose of consignment or of sale, unless the contrary thereof shall be made to appear by bill of discovery or otherwise, or be made to appear, or be shown in evidence by any person disputing such fact.

Persons in possession of bills of lading, &c. deemed owner so far as to make valid contracts.

II. And be it further enacted, That from and after the first day of October one thousand eight hundred and twenty six, any person or persons intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keepers' certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares and merchandize, or any part thereof, or for the deposit or pledge thereof or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents or either of them: Provided such person or persons, body or bodies politic or corporate, shall not have notice by such documents or either of them or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and bonâ fide owner or owners, proprietor or proprietors of such goods, wares or merchandize so sold or deposited or pledged as aforesaid; any law, usage or custom to the contrary thereof in any wise notwithstanding.

Proviso as to notice.

No person to acquire a security upon goods in the hands of an agent for an antecedent debt, beyond amount of agent's interest in the goods.

III. Provided always, and be it further enacted, That in case any person or persons, body or bodies politic or corporate, shall, after the passing of this act, accept and take any such goods, wares or merchandize in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, body or bodies politic or corporate, before the time of such deposit or pledge, then and in that case such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares or merchandize in deposit or pledge, shall acquire no further or other right, title or interest in or upon, or to the said goods, wares or merchandize, or any such document as aforesaid, than was possessed, or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares or merchandize in deposit or pledge, shall and may acquire, possess and enforce such right, title or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid; any rule of law, usage or custom to the contrary notwithstanding.

Persons may contract with known agents

IV. And be it further enacted, That from and after the first day of October one thousand eight hundred and twenty six, it shall be lawful to and for any

person or persons, body or bodies politic or corporate, to contract with any agent or agents, intrusted with any goods, wares or merchandize, or to whom the same may be consigned, for the purchase of any such goods, wares or merchandize, and to receive the same of and pay for the same to such agent or agents; and such contract and payment shall be binding upon and good against the owner of such goods, wares and merchandize, notwithstanding such person or persons, body or bodies politic or corporate, shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents: Provided such contract and payment be made in the usual and ordinary course of business, and that such person and persons, body or bodies politic or corporate, shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, wares and merchandize, or to receive the said purchase money.

in the ordinary course of business, or out of that course if within the agent's authority, notwithstanding notice.

V. And be it further enacted, That from and after the passing of this act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares or merchandize, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title or interest in or upon or to the said goods, wares or merchandize, or any such document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess and enforce such right, title or interest as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid; any rule or law, usage or custom to the contrary notwithstanding.

What interest persons accepting and taking goods, &c. in pledge from unknown agents, may acquire.

VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed or taken to deprive or prevent the true owner or owners, or proprietor or proprietors, of such goods, wares or merchandize, from demanding and recovering the same from his, her or their factor or factors, agent or agents, before the same shall have been so sold, deposited or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her or their bankruptcy; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares or merchandize so deposited or pledged, upon

Proviso for right of true owner to follow his goods while in the hands of agent or his assignee, in case of bankruptcy, or to recover them from a third person, upon paying his advances secured upon them.

repayment of the money, or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods, wares or merchandize as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents; and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any) as may have been advanced or given by such factor or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments; nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her or their hands, as the produce of the sale of such goods, wares or merchandize, after deducting thereout the amount of the money or negotiable instrument or instruments so advanced or given upon the security thereof as aforesaid; Provided always, that in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged pro tanto the debt due by him, her or them to the estate of such bankrupt.

Proviso in case of bankruptcy of factor, for owner of goods so pledged and redeemed.

VII. "And whereas it is expedient to prevent the improper deposit or pledge of goods, wares or merchandize, or the documents relating to such goods, wares or merchandize, intrusted or consigned as aforesaid to factors or agents;" Be it therefore enacted, that if any such factor or agent, at any time from and after the said first day of October one thousand eight hundred and twenty six, shall deposit or pledge any goods, wares or merchandize, intrusted or consigned as aforesaid to his or her care or management, or any of the said several documents so possessed or intrusted as aforesaid, with any person or persons, body or bodies politic or corporate, as a security for any money or negotiable instrument or instruments borrowed or received by such factor or agent, and shall apply or dispose thereof to his or her own use, in violation of good faith, and with intent to defraud the owner or owners of any such goods, wares or merchandize, every person so offending, in any part of the United Kingdom, shall be deemed and taken to be guilty of a misdemeanor, and being convicted thereof according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on persons guilty of a misdemeanor, and as the court before whom such offender may be tried and convicted shall adjudge.

Agents fraudulently pledging goods of principals, Misdemeanor;

Punishment.

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any person or persons to prosecution, for having deposited or pledged any goods, wares or merchandize so intrusted or consigned to him, her or them, provided the same shall not be made a security for or subject to the payment of any greater sum or sums of money than at the time of such deposit or pledge was justly due and owing to such person or persons from his, her or their principal or principals: Provided nevertheless, that the acceptance of bills of exchange by such person or persons drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from

Proviso for cases in which agent has not made good a security beyond extent of his own lien.

How far acceptances of bills by

such principal or principals within the true intent and meaning of this act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due.

agent create a lien.

IX. Provided also, and be it further enacted, That the penalty by this act annexed to the commission of any offence intended to be guarded against by this act, shall not extend or be construed to extend to any partner or partners, or other person or persons of or belonging to any partnership, society or firm, except only such partner or partners, person or persons, as shall be accessary or privy to the commission of such offence; any thing herein contained to the contrary in any wise notwithstanding.

Proviso for partners not privy to offence.

X. Provided also, and be it further enacted, That nothing in this act contained, nor any proceeding, conviction or judgment to be had or taken thereupon, shall hinder, prevent, lessen or impeach any remedy at law or in equity, which any party or parties aggrieved by any offence against this act might or would have had or have been entitled to against any such offender if this act had not been made, or any proceeding, conviction or judgment had been had or taken thereupon; but nevertheless, the conviction of any offender against this act shall not be received in evidence in any action at law or suit in equity against such offender: And further, that no person shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act, matter or thing done by him, if he shall at any time previously to his being indicted for such offence have disclosed any such matter or thing on oath under or in consequence of any compulsory process of any Court of law or equity, in any action, suit or proceeding, in or to which he shall have been a party, and which shall have been bonâ fide instituted by the party aggrieved by the act, matter or thing which shall have been committed by such offender as aforesaid.

And for remedies at law or equity.

No. II.

Baring and others against *Corrie and another*, 2 Barn. & Ald. 137.

The character of broker is materially different from that of factor; and, therefore, where a broker sells goods without disclosing the name of his principal: held, that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the broker to him, against the demand for the goods made by the principal.

ASSUMPSIT for goods sold and delivered. Plea, general issue. The cause was tried before Lord Ellenborough, C. J., at the London Sittings after Trinity Term, 1816, when a verdict was found for the plaintiffs, with £1423 : 3*s.* 6*d.* damages, subject to the opinion of the Court upon the following case, either the plaintiffs or the defendants being at liberty to turn the same into a special verdict.

The plaintiffs are merchants in *London*, and in the month of *June*, 1815, employed Messrs. *Coles*, as their brokers, to sell for them a parcel of sugars. *Coles & Co.* sold to the defendants the sugars on the 27th of *June*, 1815, and on the same day delivered to the plaintiffs the following sale-note: "Sold for account of Messrs. *Baring, Brothers & Co.* to Messrs. *W. and E. Corrie*, per *Active*, N. L. R. 51. 100—50 hogsheads *Surinam* Sugar, at 85*s*." *Coles & Co.* were merchants as well as brokers, and bought and sold largely on their own account, and had, before the time of the sale of the sugars in question, dealt with the defendants both in buying and selling on their own account, and in the course of such dealing had previously bought goods of the defendants, for which they had given them their acceptances for £2,700, which fell due on the 25th and 26th *August*, 1815. At the time of the sale *Coles & Co.* did not disclose to the defendants that they acted as brokers, but sold the sugars to them in their own names, and sent them the following note: "Sold Messrs. *Corrie & Co.*, per *Active*, N. L. R. 51. 100—50 hogsheads *Surinam* Sugar, at 85*s*. *June* 27th, 1815." The defendants afterwards, on or about the 10th or 11th of *July*, 1815, received the following invoice, dated 27th *June*, 1815, from *Coles & Co.*: "Messrs. *E. Corrie* bought of *Coles & Co.*, per *Active*, N. L. R., 50 hogsheads *Surinam* Sugar, at 85*s*. per cwt." The prompt or time of payment of the sugars, according to the usual course of the sugar trade, was two months. *Coles & Co.*, as sworn brokers, kept a book in which they entered a memorandum of every contract made by them as such brokers; and amongst the rest was the memorandum of the sale of these sugars to the defendants, made at the time of sale: "Bought of *Baring, Brothers & Co.*, for account of *Corrie & Co.*, per *Active*, N. L. R. 51. 100—50 hogsheads *Surinam* Sugar, at 85*s*." But the defendants never saw the book or memorandum, nor did they ever desire to see it, till after the bankruptcy of *Coles & Co.*, although they might at any time have seen it by calling at the counting-house. At the time of the sale *Coles & Co.* were employed by the plaintiffs, as their brokers, not only to sell for them their im-

ported goods, but also to receive from the buyers thereof the price when due; but they did not receive a *del credere* commission. *Coles & Co.* became bankrupts on the 14th *July*, 1815, and the prompt upon the sugars expired upon the 27th *August*. On the 3d *July* the defendants received from *Coles & Co.* the following order for the delivery of the sugars from the *West India Docks*, where they were landed and then lying: "To the principal Store-keeper of the *West India Docks*—Deliver to the order of Messrs. *W. and E. Corrie* the undermentioned goods, imported in the month of *June*, 1815, and entered by *John Deacon*, per ship *Active*, Captain *Mustard*, from *Surinam*, (prime dock-rates thereon being paid,) *June*, 1815, N. L. R. 51. 100—50 hogsheads sugar. For *Baring, Brothers & Co.* (Signed) *John Walker*." *John Walker* was the custom-house clerk of the plaintiffs, and *John Deacon* one of the partners in the house of *Baring, Brothers & Co.*, and one of the plaintiffs in the cause. By the usage in the *West India Docks*, the sugars, or other produce imported, remain in the names of the importer, or person making the entry, until such time as some parchaser thereof chooses to have the goods re-housed and entered in his name. In the mean time, and until such re-housing takes place, the order for delivery must be signed by the importer, or his agent, whatever number of sales may have been made of them; and such order is made out for delivery to the first purchaser, unless the importer should have received a written direction from the first purchaser to make it out to some other person; and that person, if he sell, indorses over such order to his vendee, unless, as in the former cases, such vendee should, in like manner, by order in writing, direct the indorsement to be made out to some other person. On the 22d *August*, 1815, the following letter, bearing date the 27th *July*, was sent by the plaintiffs to the defendants, being five days before the prompt upon the sugars expired: "We request you will settle with Mr. *Edward Kensington*, for the amount of N. L. R. 50 hogsheads Sugar, per *Active*, sold you by *Coles & Co.* on the 27th *June* last." The defendants returned the following answer, dated *August* 23d: "We are surprised at the directions contained in your letter, dated 27th *July* last, but only delivered to us yesterday, respecting 50 hogsheads Sugar, sold by *Coles & Co.* on the 27th *June*. We consider *Coles & Co.* as the proprietors of these sugars, and therefore the same will be settled for in account with them or their assignees." On the 14th *July*, 1815, when *Coles & Co.* became bankrupts, the defendants were the holders of their acceptances for £2,700.

This case was argued in Easter Term by *Puller* for the plaintiffs, and in the present Term by *Scarlett* for the defendants. The principal arguments for the plaintiffs were, that the defendants must have known that *Coles & Co.* were not selling in their own names, inasmuch as the truth of the transaction was registered in their brokers' book, which the defendants might have inspected if they had chosen to do so; and that the note delivered by them would not have bound the defendants unless it had been delivered in their character of brokers: that they possessed none of the *indicia* of property in the goods, all of which appeared to belong to the plaintiffs; and that it was impossible that the plaintiffs could know that the goods had not been sold by *Coles & Co.* in the ordinary way, as brokers, for the note delivered to them was precisely in the usual form.

And if they were not to succeed in the present action, no merchant could ever again trust a broker with safety. The cases of *George* v. *Claggett*,(a) *Rabone* v. *Williams*,(b) *Escott* v. *Milward*,(c) *Scrimshire* v. *Alderton*,(d) *Morris* v. *Cleasby*,(e) and *Moore* v. *Clementson*,(f) were cited; and *it was contended that the rule on which the right of set-off in those cases depended was this, that where the principal has by his conduct allowed the factor to hold himself out to* the world as the owner of the goods, he must take the consequences. Here, however, the plaintiffs had done no such thing; and besides, all those cases were cases of factors, between whom and brokers there is a very material difference.

For the defendant it was urged, that this case was not to be distinguished from *George* v. *Claggett*, which was still a valid decision: that as to the circumstances relied on to show that the defendants knew that *Coles & Co.* were selling as brokers, they were not conclusive. It appeared as a fact, that they acted both as brokers and merchants, and therefore a party with whom they dealt might naturally enough, in a case where they did not mention the name of their principal, conclude that they were the principals themselves in the transaction; and the order for delivery of the goods being given by the plaintiffs made no difference, for the only thing that it proved was, that they were the original importers. The only distinction between a factor and broker is, that the one has possession of the bulk of the goods, and the other only of the sample; both are in the material point the same, viz. the representatives of the real owner. And the rule of law laid down in *Hern* v. *Nichols*(g) being, that where one of two innocent persons must suffer by the fault of a third, the loss is to fall on him who has reposed the confidence, it will follow that in this case the loss must fall on the plaintiffs, whose agents *Coles & Co.* were in this transaction, and who had reposed an unusual confidence in them, by permitting them not merely to sell for them, but also to receive the price of the goods when sold.

Abbott, C. J.—If the defendants were to succeed in this case, the effect would be that the goods of one man would be applied in discharge of the debt of another. I am not disposed to come to such a conclusion unless compelled to do so by authorities which I do not find in this case. It is said that where a loss is to fall on one of two innocent parties by the deceit of a third, that it should fall on him who employs and puts a trust and confidence in the deceiver. But this rule is by no means universal. Suppose a factor who is entrusted with the possession of goods, pledges the goods, the real owner may recover them in trover against the person with whom they are pledged. And so also if a master trust his servant with plate or other valuables, and the servant sell them, still, unless they are sold in market overt, the master may recover them from the innocent purchaser. These exceptions show that the principle is by no means universal. But in this case has there been any negligence on the

(a) 7 T. R. 359.
(b) 7 T. R. 360, n. a.
(c) Co. Bank. Laws, 236.
(d) 2 Stra. 1182.
(e) 4 M. & S. 566.
(f) 2 Campb. 22.
(g) Salk. 289.

side of the plaintiffs? or rather, has there not been great negligence on the side of the defendants? *Coles & Co.*, it appears, acted in the double capacity of merchants and brokers, and that fact was well known to the defendants. Now the distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs, in this case, have only reposed the usual confidence which every merchant must place in his broker; and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker; for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether. It is argued, indeed, that there are other facts in this case, from which it is to be inferred that the plaintiffs reposed a more than usual confidence in *Coles & Co.*; and for this purpose that part of the case was relied upon which states that they were employed by the plaintiffs as their brokers, not only to sell for them the several goods imported into this country, but also to receive, when due, the price of such goods from the buyers. But inasmuch as this fact applies only to the receipt of the price of goods sold by them *as brokers*, it seems to me that the fact does not alter the case. But in what situation did the defendants stand in respect of *Coles & Co.*, and what did they omit to do? They knew that *Coles & Co.* acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they make no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case, if they had not chosen to remain in ignorance. There is, therefore, a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do. There is another circumstance, which shows that if they did not know that *Coles & Co.* were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note. Now, without entering into the question whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say that the ordinary course of dealing was not pursued, and that enough appears to show that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed, and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true, that where

two persons, equally innocent, are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver should be the loser: I think the defendants are the persons who have in this case placed a more than usual confidence in *Coles & Co.*, and that they must bear the loss occasioned by the act of the latter.

Bayley, J.—I am entirely of the same opinion. This is an action brought by a merchant to recover the price of his own goods, and he ought therefore to succeed, unless payment, or something equivalent to it, appears to have taken place. The demand, however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of *Coles & Co.*, and that they have a counter-demand against them, which they are entitled to set off against the price of the goods. A proprietor, generally speaking, is entitled to receive the price of his own goods, unless, by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means, to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern* v. *Nichols*.(a) There arise then three questions:—*First*, Did the plaintiffs enable *Coles & Co.* to appear as proprietors of the goods, and to practise a fraud upon the defendants? *Secondly*, Did *Coles & Co.* actually practise a fraud? And, *thirdly*, Did the defendants use due care and diligence to avoid such fraud? All these questions must, under the circumstances of this case, be answered against the defendants. It appears that *Coles & Co.* were both brokers and merchants, and that they on the 27th of *June*, 1815, were empowered to sell the goods in question. They delivered to the plaintiffs a sold note exactly in the proper form, supposing them to have sold in their character of brokers; and they delivered to the defendants a bought note, exactly suited to the case of their having sold as brokers, without having disclosed the name of the seller. If it were even doubtful whether *Coles & Co.* sold as merchants or not, there was at least enough to have induced the defendants to make inquiry; for, supposing them to sell in their character of brokers, it was not necessary for them to take a counter-note from the defendants; but if they had sold as merchants, that would be necessary. When, therefore, they delivered only a sale note, and required none in return, that ought to have raised a strong presumption in the minds of the defendants that the sale was in their character of brokers. And there is nothing inconsistent in that view of the case, for *Coles & Co.* do not say that they sell the goods as their own, and the defendants ask no questions on that subject. Then, on the 3d of *July*, comes the delivery order signed by the plaintiffs: at that time, therefore, the defendants must have known that the plaintiffs were parties concerned, and might have satisfied any doubts which they entertained upon the subject. It is besides to be observed, that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the case of *Rabone* v. *Williams*, and that of *George* v. *Claggett*. There is another circumstance by which the defendants might easily have ascertained whether *Coles & Co.* acted as brokers or not. According to the usual course of dealing, a broker is bound

(a) Salk. 289.

to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case; so that if the defendants had asked to see the book, they would instantly have discovered whether *Coles & Co.* acted as brokers or not. I think, therefore, that it appears from these circumstances the plaintiffs did not by their conduct enable *Coles & Co.* to hold themselves out as the proprietors of these goods, and so to impose on the defendants; that the defendants were not imposed upon, and even supposing that they were, that they must have been guilty of gross negligence. Besides, when *Coles & Co.* stood at least in an equivocal situation, the defendants ought, in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that *Coles & Co.* sold them on their own account; and if so, they can have no defence to the present action. The course of dealing, it appears, was for the brokers to receive for the plaintiffs the price when due: if, therefore, the defendants had remained ignorant of the state of things till after that period had arrived, the case might have been different; but, before that time arrived, it appears that they were distinctly informed that the plaintiffs were the proprietors of the goods. There must, therefore, be judgment for the plaintiffs.

HOLROYD, J.—I am of opinion that the defendants have not any right of set-off in this case. A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sell in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and indicia of property. The rule stated in the case in *Salkeld* must be taken with some qualifications; as, for instance, if a factor, even with goods in his possession, act beyond the scope of his authority, and pledge them, the principal is not bound; or if a broker having goods delivered to him, be desired not to sell them, and sell them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of *caveat emptor* applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of set-off cannot be allowed.

Judgment for plaintiffs.

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